(27,156)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 401.

NAPA VALLEY ELECTRIC COMPANY, APPELLANT,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA AND MAX THELEN, ALEX. GORDON, H. D. LOVELAND, ET AL., AS MEMBERS, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1919.

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1 In the District Court of the United States, Northern District of California, Second Division.

No. 396. Eq.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, ALEX. GORDON, H. D. LOVELAND, EDWIN O. EDGERTON and FRANK R. DEVLIN, as Members of and Constituting the Railroad Commission of the State of California, Defendants.

Bill in Equity.

To the Honorable the Judges of the District Court of the United States, Northern District of California, Second Division:

The Napa Valley Electric Company, a corporation, as hereinafter stated, files this its Bill of Complaint against the Railroad Commission of the State of California and Max Thelen, Alex. Gordon, H. D. Loveland, Edwin O. Edgerton and Frank R. Devlin, as members of and constituting the said Railroad Commission of the State of California, and thereupon your orator and complainant complains and avers as follows:

2 I.

That your orator is, and ever since 1907 has been, a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business at the City of Napa, County of Napa, State of California;

II.

That the defendants Max Thelen, Alex. Gordon, H. D. Loveland, Edwin O. Edgerton and Frank R. Devlin are now, and at the time of the rendition of the order of said State Railroad Commission, dated November 15, 1916, as hereinafter alleged, were, and ever since have been, the duly appointed, qualified and acting members of said Railroad Commission of the State of California, and at the time of the rendition of said order did constitute, and ever since have constituted, and now constitute said Railroad Commission of the State of California;

III.

That Calistoga Electric Company now is, and for about seven (7) years last past has been, a corporation duly organized and existing under and by virtue of the laws of the State of California, and hav-

ing its principal place of business at the town of Calistoga, in the County of Napa, State of California;

IV.

That your orator, Napa Valley Electric Company, now is and for more than ten years last past has been, engaged in supplying and distributing electric energy and power for domestic use to certain individuals in the town of St. Helena, and vicinity, in the
3 County of Napa, State of California, and also in supplying and distributing electric energy and power to the said town of St. Helena in the said County of Napa; that your orator now is, and for about seven (7) years last past has been, engaged in selling electric energy and power to the said Calistoga Electric Company. That the said Calistoga Electric Company is not a consumer of said electrical energy and power, but, on the contrary, is a distributing agency of your orator, and that your orator is not performing any public service in supplying the said Calistoga Electric Company with electric energy and power, and that your orator is not, as to said Calistoga Electric Company, a public utility;

V.

That in 1911 the inhabitants of the town of Calistoga, in the said County of Napa, State of California, were being served with electric energy from a distributing plant owned by one William Spiers. That at said time the Napa Valley Electric Company, your orator, was a public utility corporation, duly organized and existing under and by virtue of the laws of the State of California, actively engaged in operating its business, and supplying and furnishing the inhabitants of St. Helena, and the vicinity thereof, with electric power for domestic, illuminating and power purposes, as aforesaid; that at said time your orator was desirous of extending its distributing system and entering the town of Calistoga and of supplying its inhabitants with electric energy, and was actually extending its lines into the Calistoga territory; that in the year 1911, and while your orator was extending its distributing system into the Calistoga territory, as aforesaid, the said Spiers offered his said plant and business
4 for sale and began negotiations with your orator for the sale thereof; that your orator and said Spiers were about to reach an agreement for the sale of said plant and business by said Spiers to your orator, and your orator was about to purchase the said property, when one E. L. Armstrong offered to enter into a certain contract with your orator, as hereinafter more particularly set forth; that said Armstrong was at said time the owner of the Calistoga Water Company, a public utility corporation, organized and existing under and by virtue of the laws of the State of California, and serving the inhabitants of the town of Calistoga with water; said Armstrong thereupon made the following proposition with your orator, to-wit: That by reason of the ownership of said Water Company he could operate the said electrical business, then owned by Spiers, in conjunction therewith in such a manner as to save considerable overhead

expense; that he was desirous of purchasing the said electrical business, but that he would not do so if your orator entered said Calistoga territory, then being served by said Spiers; that your orator should drop all negotiations with Spiers for the purchase of said property and permit him, Armstrong, to purchase it at a reasonable figure; that your orator should further agree not to extend its lines into the Calistoga territory, and not to serve the inhabitants of Calistoga, and not become a competitor of Armstrong; that in consideration of said agreement and action on the part of your orator, he, the said Armstrong, would buy all electric energy to be sold by him to his customers from your orator; that thereupon your orator accepted said offer of Armstrong and entered into a written contract, dated May 13, 1911, with said Armstrong, wherein and whereby said Armstrong agreed to buy from your orator all of the electric energy to be sold by him for a period of eighteen (18) years, from date of said contract, at three (3¢) cents per K. W. H.

That a copy of said contract marked Exhibit "A" is attached hereto and is hereby especially referred to and made a part hereof with the same force and effect as if recited in full herein; that according to the provisions of paragraph "Seventh" of said contract your orator agreed not to solicit or take business in the territory at Napa County to be served by said Armstrong; that said Armstrong would not have purchased the said property from said Spiers if your orator had not agreed to remain out of said territory; that if said contract had not been entered into, your orator would have entered the said territory then being served by said Spiers, but that relying upon the said contract with said Armstrong your orator ceased extending its distributing system into the said Calistoga territory, and abandoned said territory to said Armstrong and gave up all of its rights to serve that territory and all anticipated profits to be derived from the business thereof; that at the date of said contract, and at the time your orator was extending its lines into the Calistoga territory, your orator had the legal right to so extend its lines and to become a competitor of Spiers and Armstrong, his successor; that under the then existing provisions of Section 19, Article XI, of the Constitution of the State of California, it was the policy of the said State of California to extend such right and to encourage such competition;

VI.

That on or about the 14th day of September, 1911, the said Calistoga Electric Company became the successor in interest of said E. L. Armstrong, and to all the rights and obligations of said contract between said Armstrong and your complainant, dated May 13, 1911; that said Calistoga Electric Company acknowledged its obligations under said contract and continued to buy its electric energy from your orator at the rates set forth in said contract, and under the terms and conditions thereof, until the 18th day of November, 1913, when it filed its Petition with the Railroad Commission of the State of California, being Case No. 508 of the Records of said Com-

mission, asking that said contract be set aside and that your orator be compelled to sell it electric energy and power at rates other and lower than those set forth in said contract; that a copy of said Complaint marked Exhibit "B" is attached hereto and is hereby especially referred to and made a part hereof, with the same force and effect as if recited in full herein;

VII.

That thereupon your orator filed its Answer and Supplemental and Amended Answer to said Petition of said Calistoga Electric Company with said Railroad Commission; that said Answer and Supplemental and Amended Answer set up said contract be-
7 tween E. L. Armstrong, the predecessor in interest to said Calistoga Electric Company, as a defense to said Complaint and your orator resisted the said Complaint of said Calistoga Electric Company on the ground that any change in the terms of said contract was an impairment of the obligation of said contract, and was contrary to the rights of your orator under the provisions, and in violation of Section 10, Article I, of the Constitution of the United States, and also contrary to the provisions of the fourteenth Article of Amendment to the Constitution of the United States; that a copy of said Answer and said Supplemental and Amended Answer, respectively, marked Exhibit- "C" and "D" respectively, are annexed hereto and are hereby especially referred to and made a part hereof with the same force and effect as if set forth in full herein;

VIII.

That on the 24th day of January, 1914, defendants, as said Railroad Commission, instituted, on their own motion, an investigation into the rates charged by your orator for electric energy, being Case No. 538 of the Records of said Commission;

IX.

That thereafter said Railroad Commission fixed a time and place for the hearing of said Complaint of said Calistoga Electric Company and said investigation by said Commission, for which purpose, by agreement of all parties, the said matters were consolidated, and at which time all parties to said proceedings appeared and the said hearing was thereupon heard, and evidence adduced by
8 the parties and by the said Commission; that thereupon said matters were submitted to said Commission for its determination and decision;

X.

That thereafter and on the 21st day of May, 1914, defendants rendered their Decision and Order upon said Complaint and said Investigation; that said Opinion and Order fixed the rates to be

charged by your orator to said Calistoga Electric Company for electric energy rates different from and much less than the rates fixed in said contract dated May 13, 1911; that a copy of said Order and decision, marked Exhibit "E" is attached hereto and is hereby especially referred to and made a part here of as if recited at full herein; that said Decision and Order of said defendants is an impairment of the rights and privileges of your orator and is contrary to the provisions of Section 10 of Article I of the Constitution of the United States as impairing the obligations of contracts, and is also contrary to the provisions of the fourteenth Article of the Amendments to the Constitution of the United States as a taking of property without due process of law.

XI.

That thereafter and on the 20th day of June, 1914, your orator filed with said defendants, it's Petition for a rehearing of said Order and Decisions, wherein and whereby it requested and prayed the said defendants to set aside said Order and Decision and grant your orator a rehearing thereon upon the grounds that said Decision and Order was contrary to the provisions of Section 10, Article
9 1, of the Constitution of the United States as impairing the obligations of contracts, and also contrary to the provisions of the fourteenth Article of the Amendments thereto, as a taking of property without due process of law;

That thereafter and on the 11th day of July, 1914, said defendants filed an Order denying said Petition for Rehearing:

XII.

That on or about the 1st day of May, 1914, and prior to the rendition of said Order dated May 21, 1914, said Calistoga Electric Company and your Petitioner entered into an Agreement fixing the rates to be charged to said Calistoga Electric Company by your orator for electric energy; that said Agreement was reduced to writing and duly signed by said Calistoga Electric Company and your orator on or about the 15th day of September, 1914; that a copy of said Agreement marked Exhibit "F" is hereunto annexed, and is hereby especially referred to and made a part hereof;

That it was provided in said Agreement that said rates therein fixed be subject to the approval of said Railroad Commission; that said Calistoga Electric Company agreed to secure the approval of said Railroad Commission, and thereafter informed your orator that it had secured the said approval of said Railroad Commission; that said Calistoga Electric Company did, as a matter of fact, secure the informal approval of said Commission of the rates fixed by said Agreement, and both your orator and said Calistoga Electric Company proceeded upon the theory that the said Railroad Commission had approved the rates set forth in said Agreement, and that the

said rates established by said Agreement were the legal and
10 existing rates to be charged said Calistoga Electric Company by your orator; and your orator did thereupon, and at all times, up to the 27th day of June, 1916, charge the said Calistoga Electric Company for electric energy furnished to said Company by your orator at the rates set forth and provided by said Agreement; that by reason of the said Agreement between said Calistoga Electric Company and your orator, the rates established by said Railroad Commission in their said Order of May 21, 1914, never became effective and were never charged by your orator to said Calistoga Electric Company for the reasons hereinabove stated; that for the reasons hereinabove stated your orator did not file it's Petition or Writ of Review in the Supreme Court of the State of California, asking said Court to review and set aside as null and void the said Order of said Railroad Commission dated May 21, 1914; and for the reasons hereinabove stated your orator did not commence any proceedings in this Court, or any other Court of the United States for the purpose of enjoining the said Railroad Commission from enforcing the said Order of May 21, 1914, and to set aside the said Order of the Railroad Commission as null and void;

XIII.

That thereafter and on the 27th day of June, 1916, the said Calistoga Electric Company filed its Complaint with said Commission, being case No. 967 of the Records of said Railroad Commission, asking and praying that said Railroad Commission establish different and lower rates to be charged said corporation by your orator than those fixed and established by the said Agreement dated September
15, 1916, between said Calistoga Electric Company and your
11 orator, and also different and lower than those established and fixed by said Commission in it's Order dated May 21, 1914, as hereinbefore recited;

XIV.

That thereafter and on the 28th day of June, 1916, your orator filed with said Railroad Commission it's Application for a Supplemental Order in Case No. 508 and Case No. 538, asking and praying said Commission to modify it's Order and Decision made and rendered in said cases on the 21st day of May, 1914, as hereinabove set forth and establishing and fixing the rates to be charged by your orator to said Calistoga Electric Company, at the rates and upon the terms and conditions set forth in said contract theretofore entered into between your orator and said Calistoga Electric Company, as hereinabove and in Paragraph XII hereof recited;

That thereafter and on the 27th day of July, 1916, your orator filed it's Answer to said Complaint in Case No. 967 of the said Railroad Commission; that in said Answer your orator set up contracts of May 13, 1911, and September 15, 1914, as a defense to said proceedings, and alleged that the said Railroad Commission was with-

out right or jurisdiction to fix rates other than those provided in said contracts;

XV.

That thereafter said defendants fixed a time and place for hearing said Complaint in Case No. 967 and said Application for the Supplemental Order in Case No. 508 and Case No. 538, for which purpose, by consent of all parties, all of said matters were consolidated
12 for hearing, and at which time and place the parties appeared, and evidence was adduced by said parties and by said Railroad Commission, and the said matters were thereupon submitted to said Railroad Commission for decision; that thereafter and on the 15th day of November, 1916, defendants, said Railroad Commission, rendered their Opinion and Order upon said Complaint and said Application; that by said Opinion and Order the said Application of your orator for a modification of said Opinion and Order of May 21, 1914, was denied, and the said rates fixed by the said contract of September 15, 1914, were altered, modified and reduced and fixed other than those as set forth in said contract; that a copy of said Order and Decision marked Exhibit "G" is attached hereto and is hereby especially referred to and made a part hereof with the same force and effect as if recited at full herein;

XVI.

That by orders duly and regularly made and entered by said Railroad Commission, the effective date of said Order and Decision of November 15, 1916, was extended to and including the 20th day of December, 1916;

XVII.

That on the said 20th day of December, 1916, your orator filed a Petition for Rehearing of said Order dated November 15, 1916, with said Railroad Commission; that a copy of said Petition for Rehearing marked Exhibit "H" is hereto annexed and is hereby especially referred to and made a part hereof with the same force and effect as if recited at full herein;

That on the said 20th day of December, 1916, by an Order duly made and entered by said Railroad Commission, the effective date of said Order fixing rates dated November 15, 1916, was extended until the final determination by defendants of said Petition
13 for Rehearing;

That thereafter and on the 24th day of May, 1917, said Railroad Commision filed it's Order denying said Petition for Rehearing;

XVIII.

That thereafter and on the 20th day of June, 1917, your orator duly filed in the Supreme Court of the State of California, its Petition for a Writ of Review, asking and praying that a Writ of Review

issue out of said Court commanding said Railroad Commission to certify to said Court, on a day named in said Writ, a full and complete record of all the proceedings leading up to the making of said Order and Decision dated May 21, 1914, together with said Order and Decision and your orator's Application for a Rehearing thereof; and also a full and complete record of all the proceedings leading up to the making of said Order and Decision dated November 15, 1916, together with said Order and Decision and orator's Application for a re-hearing thereof, and that upon the return of such Writ, said Orders and Decisions of the said Railroad Commission be reversed and vacated and annulled upon the ground that said Orders and Decisions violate the rights of your orator under the Constitution of the United States, and more particularly its rights under Section 10 of Article I thereof, and under Section 1 of Article XIV of the Amendments thereto; that the said Supreme Court of the State of California denied your orator's said Petition for a Writ of Review and refused to issue a Writ of Review, as prayed for in said Petition;

XIX.

That since each and all of the proceedings and transactions
14 hereinabove recited and on or about the 27th day of January, 1918, the said Calistoga Electric Company, by an instrument in writing, duly signed and acknowledged and recorded in the office of the County Recorder, in and for the County of Napa, State of California, has granted, sold, assigned, transferred and delivered unto California Light & Telephone Company, a corporation duly organized and existing, as hereinafter more fully recited, all of the physical properties, good will and business of said Calistoga Electric Company, and all of the existing contracts to which said Calistoga Electric Company was a party, and more particularly the said contracts dated May 13, 1911 and September 15, 1914, between your orator and said Calistoga Electric Company, with all of the rights, obligations and burdens of said contracts; and by said conveyance the said California Light & Telephone Company has become a party to said contracts in the place and stead of said Calistoga Electric Company;

That the said California Light & Telephone Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City of San Francisco, State of California;

XX.

That the said Order and Decision of defendants made on the 21st day of May, 1914, as aforesaid, and the said Order and Decision of defendants made on the 15th day of November, 1916, as aforesaid, were erroneous and unlawful, and in making the same defendants did not regularly prosecute their authority; that said Orders and
Decisions violate the rights of your orator under the Constitu-
15 tion of the United States, and more particularly its rights under Section 10 of Article I thereof, and under Section 1 of

Article XIV of the Amendments thereto; that in making said orders and Decisions, defendants exceeded their jurisdiction and there is no appeal, nor any plain, speedy or adequate remedy open to your orator, other than these proceedings; that said Orders and Decisions are irregular and unlawful upon the ground that they impair the obligations of the contracts existing between your orator and the said Calistoga Electric Company, and also constitute a taking of your orator's property without due process of law, all as stated in your orator's said Applications for Rehearings before said Railroad Commission, and also in your orator's Petition for a Writ of Review before the Supreme Court of the State of California;

XXI.

In consideration whereof and inasmuch as your orator can have no adequate relief except in this Court, and to the end that defendants may make, if they can, full disclosure and discovery of their alleged claims and assertions and rights in the premises, and according to the best and utmost of their remembrance, knowledge, information and belief, full, true and perfect answer to the matters hereinbefore stated and charged, your orator brings this action and hereby waives verification to the Answer of defendants;

May it please your Honors to grant unto your orator a Writ of Subpœna directed to the said defendants, and each and all of them, commanding them on a day certain to appear and answer to this Bill of Complaint, and to abide by and perform such Order
16 and Decision in the premises as to this Court may seem proper, and be required by the principles of equity and good conscience;

And your orator further prays that this Court and your Honors order and decree as follows:

First. That said Order of said Railroad Commission of the State of California, dated May 21, 1914, is null and void and of no effect in so far as it provides that your orator shall not charge or receive for electric energy furnished and supplied by it to California Light & Telephone Company rates in excess of those therein particularly specified, or other than and different from those set forth in said contract with Calistoga Electric Company, dated May 13, 1911;

Second. That said Order of said Railroad Commission of the State of California, dated November 15, 1916, is null and void and of no effect in so far as it provides that your orator shall not charge or receive for electric energy furnished and supplied by it to said California Light & Telephone Company rates in excess of those therein particularly specified, or other and different from those set forth and particularly specified in said contract dated September 15, 1914;

Third. That your orator is entitled to rates for supplying electric energy to said California Light & Telephone Company, as aforesaid,

as fixed by the said contract with Calistoga Electric Company dated September 15, 1914; or in event it be held that said contract of September 15, 1914, never became of any force or effect, then and in that event, that your orator is entitled to the rates for supplying electric energy to said California Light & Telephone Company, as aforesaid, as fixed by said contract dated May 13, 1911;

Fourth. That each and all of said defendants, and said Calistoga Electric Company and said California Light & Telephone Company be, pending this litigation, and perpetually at the conclusion of this litigation, enjoined from enforcing, or attempting to enforce, the said Orders of the said Railroad Commission dated May 21, 1914, and November 15, 1916, respectively, and from bringing, or causing to be brought, or prosecuting, or causing to be prosecuted, any suit or action against your orator, in law or in equity, to enforce said Orders, or either of them, or any forfeiture of your orator's franchise, work or property, or for any other purpose on account of its failure or refusal to conform to the rates prescribed in said Orders, or either of them, and from any attempt, whether directly or indirectly, to compel your orator to furnish electric energy to said California Light & Telephone Company at the rates set forth in said Orders, or either of them. And upon the filing of this Bill of Complaint, this Court, or your Honors, by Order duly given and made, upon such provisos as may seem equitable, direct the defendants to show cause on a day certain why such injunction should not be issued pending this litigation, and that in the meantime, upon and from the filing of this Bill of Complaint, until the determination of this Court, or your Honors, under such Order to Show Cause, a like temporary Injunction and Restraining Order be granted by this Court or your Honors.

Fifth. That your orator may have such other and further relief as to this Court and to your Honors may seem meet and agreeable in equity.

MILTON T. U'REN,
U'REN & BEARD,
Solicitors for Complainant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

D. L. Beard, being first duly sworn, deposes and says:

That he is the President of the Napa Valley Electric Company, a corporation, the complainant above named, and that he makes this verification on behalf of such corporation; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

D. L. BEARD.

Subscribed and sworn to before me this 19th day of April, 1918.

JOHN E. MANDERS,
Notary Public in and for the City and County
[SEAL.] *of San Francisco, State of California.*

19 EXHIBIT "A."

Agreement.

NAPA, CALIFORNIA, May 13, 1911.

This agreement between The Napa Valley Electric Company, a corporation existing under the laws of the State of California, and having its principal place of business at Napa, Napa County, California, and E. L. Armstrong of Calistoga, same County and State, binds both the parties hereto as follows:

First. E. L. Armstrong agrees that, within sixty days from this date, he will form a corporation to be known as the Calistoga Electric Co., for the purpose of retailing electric current in the town of Calistoga and that other part of Napa County lying north of an east and west line at the Southerly line of intersection of The County Road to Bale Station with the right of way of the Southern Pacific Company, north of St. Helena, Napa County, California, and will assign this contract to said corporation when it shall have been formed.

Second. The Napa Valley Electric Company agrees to furnish E. L. Armstrong, and his successors in interest, as soon as the system of pole lines and distributing apparatus shall have been installed, at the point on the pole line between St. Helena and Calistoga above designated, electric energy which he shall require for his business in Calistoga and in that part of Napa County North of said line running east and west at the said point of delivery of electric current.

20 Third. The current so delivered shall be a three phase alternating current of an approximate potential of six thousand volts, and the current used during any calendar month shall be paid for not later than the tenth of the following month at the office of the Napa Valley Electric Company, in St. Helena, Napa County, California, at the following rates:

For Light. Five cents per kw. for the first ten thousand kw. When the current used for lightning shall have reached an amount more than ten thousand kw. for any month the rate shall be, for such month, four and one quarter cents for all current consumed for lightning purposes, and when it shall have reached the amount of fifteen thousand kw. for any one month the rate for such month shall be three and one half cents per kw. for such current used for lightning purposes.

For Power. The rate shall be five cents per kw. provided that if the consumption for any month is greater than two thousand kw. the rate for such month shall be four cents. If more than three

thousand kw. is used for power purposes in any one month the rate for such month shall be three and one half cents, and if more than four thousand kw. is so used in any one month the rate for such month shall be three cents, and if five thousand kw. or over is used in any one month the rate for such month shall be two and one half cents.

Fourth. The quantity of current consumed is to be determined by properly installed, standard measuring apparatus, to be installed and maintained at the expense of the Napa Valley Electric Company, at the point of delivery. E. L. Armstrong for himself and successors agrees that current sold for power purposes shall be measured on specially installed meters in order that it may
21 be readily determined how much current is used for power and how much for lightning purposes, and the installation of such measuring apparatus shall be satisfactory to the Napa Valley Electric Company, and the Napa Valley Electric Company shall have the privilege, not oftener than quarterly, of checking the readings of power meters through on the books of E. L. Armstrong and his successors in interest.

Fifth. It is mutually agreed that all the electric energy necessary for the business of E. L. Armstrong and his successors in interest shall be purchased from the Napa Valley Electric Company, and the Napa Valley Electric Company will supply such energy from the present unutilized energy at its command, and from any future unutilized energy according to the terms of its contracts dated June 26, 1907, or contracts which may in the future be entered into with the Snow Mountain Water and Power Company, provided that no such future contracts between Napa Valley Electric Company and the Snow Mountain Water and Power Company shall curtail any of the rights secured by this contract to E. L. Armstrong and his successors in interest.

Sixth. If at any time there shuld be shortage of energy E. L. Armstrong and his successors in interest shall have the right, during the time such shortage exists, to purchase his required energy elsewhere.

Seventh. The Napa Valley Electric Company agrees not to solicit or take business in the territory in that part of Napa County northerly of the point of delivery where the installation of any one consumer shall be for less than one hundred horse power, so long as E. L. Armstrong and his successors shall faithfully carry out
22 the terms of this agreement. Where installations for consumption of current in amounts greater than one hundred horse power are made the Napa Valley Electric Company reserves the right to deal direct with the consumer.

Eighth. It is understood that this contract shall run for eighteen years from date hereof, provided, however, that, at the end of three years, upon a six months' written notice given in advance by E. L. Armstrong or his successor in interest, of a desire to sell this electric light and power business, The Napa Valley Electric Company will

buy from E. L. Armstrong or his successor in interest, the physical plant and business, paying therefor the cost of installation of the physical plant of said E. L. Armstrong and his successors in interest, together with such interest per annum thereon from date of installation, as will insure a return of six per cent per annum on the invested capital for the time it has been invested. However, such cost of installation must be shown to have been a reasonable cost.

Ninth. It is further agreed by the Napa Valley Electric Company that in case of the sale of Napa Valley Electric Company, under its contract of June 26, 1907, to Snow Mountain Water and Power Company, it will, by purchase of the electric plant of E. L. Armstrong or his successors in interest, and by such other means as may be necessary, extend to said E. L. Armstrong and his successors in interest, every protection to his business in case of competition or jeopardy from any other cause, and to his investment in his electric plant, that the Snow Mountain Water and Power Company has guaranteed to the Napa Valley Electric Company in its con-
23 tracts at present in force, or in contracts which may hereafter be executed by it with the Napa Valley Electric Company, provided that no such future contracts between the Napa Valley Electric Company and the Snow Mountain Water and Power Company shall curtail any of the rights secured by this contract to E. L. Armstrong and his successor in interest.

And it is further agreed that in case of purchase of the electric plant and business of E. L. Armstrong and his successor in interest by the Napa Valley Electric Company under the terms of this paragraph the purchase price shall be the same as that which the Napa Valley Electric Company shall receive on the resale of said plant to Snow Mountain Water and Power Company.

Tenth. It is understood and agreed that the Napa Valley Electric Company shall not be held liable for any loss or damage whatever to said E. L. Armstrong and his successor in interest for any act or acts or delinquincies over which it has no control.

Eleventh. It is further mutually agreed that in case of any disputes arising out of the terms of this contract and the execution of them, that within two weeks after written notice of demand by either party hereto, each party hereto shall choose one arbitrator, these shall choose a third, and the judgment of these three shall be, in the matter and settlement of said dispute, final.

Twelfth. This agreement shall bind in every particular E. L. Armstrong, his heirs, successors, and assigns, and the successors and assigns of the Napa Valley Electric Company, also the Napa Valley Electric Company.

E. L. ARMSTRONG.
NAPA VALLEY ELECTRIC COMPANY,
By D. L. BEARD,
Pres.,
[SEAL.] By H. J. LEWELLING,
Sec'y.

24 EXHIBIT "B."

No. 508.

CALISTOGA ELECTRIC COMPANY, Complainant,

vs.

NAPA VALLEY ELECTRIC COMPANY, Defendant.

The Complaint of the Calistoga Electric Company incorporated under the laws of the State of California, September 14th, 1911, having its office and principal place of business in the town of Calistoga, County of Napa, and State of California, respectfully shows: That the complainant is engaged in the business of buying and selling Electric energy in the Town of Calistoga and vicinity situate in the County of Napa and State of California.

That defendant, the Napa Valley Electric Company, a corporation whose principal place of business is in the Town of St. Helena, County of Napa and State of California—That among other business supplies electric energy to the Napa Valley, in Napa County, California, between a point some four miles south of Yountville and what is known as Bale Station, on the line of the Southern Pacific Company between St. Helena and Calistoga, California.

That complainant has succeeded to a certain contract by and between defendant and E. L. Armstrong, dated May 13, 1911, a copy of which is hereto attached and made a part of this complaint.

That by reason of the rates for Electric energy exacted under
25 the terms of the contract by defendant, complainant is unable to distribute and sell electric energy to consumers at rates now established, except at a loss to complainant.

That defendant discriminates against complainant in rates charged for Electric energy by reason of rates now being charged for Electric energy sold to the Veterans Home at Yountville, Napa County, California, said rate being very much lower than rate now charged complainant for similar service.

That defendant has failed to obey an order made by the Railroad Commission of California under Decision No. 289, Decided October 18th, 1912.

That complainant, as a consumer, is, and has been entitled to a reduction in rates, under said Decision and Order since October 18th, 1912, which complainant has not received.

Wherefore, complainant asks that such rates be established as may be deemed fair and just to all parties concerned, and that refund of all money paid by complainant to defendant for Electric energy in excess of such ordered reduction under said Decision No. 289.

Dated Calistoga, California this 18th day of November, 1913.

CALISTOGA ELECTRIC COMPANY,
By C. W. ARMSTRONG,
President.

(Endorsed:) Railroad Commission, State of California. Filed Nov. 18, 1913. Charles R. Detrick, Sec. No. 508 Ex. —.

26 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Calistoga Electric Company by its President being first duly sworn, deposes and says; that he is the Complainant in the action entitled as above; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and that as to those matters he believes it to be true.

C. W. ARMSTRONG.

Subscribed and sworn to before me this 18th day of November, 1913.

JOHN L. MURPHY,
[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

27 EXHIBIT "C."

Before the Railroad Commission of the State of California.

Case No. 508.

THE CALISTOGA ELECTRIC COMPANY, Complainant,

vs.

THE NAPA VALLEY ELECTRIC COMPANY, Defendant.

Answer.

Comes now the above named defendant, The Napa Valley Electric Company, a corporation, and answering complainant's complaint on file herein, admits, alleges and denies as follows:

I.

Admits that the complainant *is* incorporated under the laws of the State of California, September 14, 1911—having its principal office and place of business in the Town of Calistoga, County of Napa, State of California;

II.

Denies that complainant is engaged in the business of buying and selling electric energy in the Town of Calistoga and vicinity, situate in the County of Napa, State of California, and on this behalf defendant alleges that said complainant is the distributing agent of defendant, for the purpose of distributing electric energy, on behalf of defendant, to the inhabitants of the Town of Calistoga and vicinity,

situate in the County of Napa, and State of California, under the terms and conditions of a certain written contract, entered into by and between defendant and one E. L. Armstrong, dated May
28 13, 1911, to which contract complainant has succeeded in the place and stead of said Armstrong;

III.

Admits that defendant is a corporation, having its principal place of business in the Town of St. Helena, County of Napa, and State of California, but denies that among other business, defendant supplies electric energy to only that portion of the Napa Valley, in Napa County, California, between a point some four (4) miles south of Yountville and what is known as Bale Station on the line of the Southern Pacific Company, between St. Helena and Calistoga, California; but alleges that defendant supplies electric energy to all that part of Napa County north of an East and West line four (4) miles south of the Southern Pacific Station at Yountville;

IV.

Admits that complainant has succeeded to a certain contract by and between the defendant and E. L. Armstrong, dated May 13, 1911, a copy of which contract is attached to and made a part of the complaint on file herein;

V.

Denies that by reason of the rates charged for electric energy exacted under the terms of the contract by defendant complainant is unable to distribute and sell electric energy to consumers at rates now established, except at a loss to complainant;

VI.

Denies that defendant discriminates against complainant in the rates charged for electric energy by reason of rates now being charged for electric energy sold to the Veterans' Home at Yountville, Napa County, California, or at all;

29 VII.

Denies that defendant has failed to obey an order made by the Railroad Commission of the State of California, under Decision No. 289, decided October 18, 1911.

VIII.

Denies that complainant, as a consumer, is and has been, entitled to a reduction in rates under said Decision and Order since October 18, 1912.

IX.

Denies that complainant is entitled to a refund, from defendant, *or* any or all money paid by complainant for electric energy, furnished to said complainant by defendant.

Wherefore, defendant prays that complainant take nothing by this action and that said Complaint be dismissed.

MILTON T. U'REN,
Attorney for Defendant, #57 Post Street,
San Francisco, California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

D. L. Beard being first duly sworn deposes and says; that he is the president of the Napa Valley Electric Company, a corporation, the defendant above named, and that he makes this verification on behalf of such corporation; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things which are therein stated upon information and belief, and that as to such matters he believes it to be true.

D. L. BEARD.

Subscribed and sworn to before me this 31st day of December, 1913.

ROBERT R. RUSS,
[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

30 EXHIBIT "D."

Before the Railroad Commission of the State of California.

Case No. 508.

THE CALISTOGA ELECTRIC COMPANY, Complainant,

vs.

THE NAPA VALLEY ELECTRIC COMPANY, Defendant.

Supplemental and Amended Answer.

Comes now the above named defendant, the Napa Valley Electric Company, a corporation, and further answering complainant's complaint on file herein, and as a supplemental and amended answer to said complaint, and in addition to its answer on file herein, which said answer is hereby especially referred to and made a part hereof, complains and alleges as follows:

I.

That on the 13th day of May, 1911, defendant entered into a written contract with one E. L. Armstrong, a copy of which contract is attached to and made a part of the complaint on file herein, whereby and wherein the said E. L. Armstrong agreed within sixty (60) days thereafter that he would form a corporation to be known as the Calistoga Electric Company, for the purpose of retailing electric power in the Town of Calistoga and that other part of Napa County lying north of an East and West line at the southerly line of intersection of the County Road to Bale Station, with the right of way of the Southern Pacific Company, north of St. Helena, Napa County, California, and that the said Armstrong would as-
31 sign said contract to said corporation when it should have been formed;

That thereafter and on or about the 14th day of September, 1911, the said Armstrong formed, or caused to be formed, a corporation known as the Calistoga Electric Company, which said corporation is the complainant in this action and that the said Armstrong did thereafter assign to said corporation, the said contract between himself and the defendant herein, dated May 13, 1911;

II.

That thereafter, and in pursuance *to* the terms and conditions of said contract, the said complainant and defendant entered into the performance of the terms and conditions of said contract, and did, in pursuance *to* the terms and conditions of said contract, actually perform and carrry out the terms and conditions of said contract, and are now carrying out and performing the terms and conditions of said contract, except and provided as hereinafter set forth;

III.

That the said complainant has refused and neglected to abide by the provisions of Paragraph 8 of said contract, regarding the sale and price of the plant and business of said complainant, as follows: that the complainant has since the execution of said contract, and prior to the beginning of this action, offered to sell to defendant its physical plant and business at a fixed price, which said offer this defendant has accepted; that the said complainant has refused and neglected to proceed to the consummation of said sale, but on the contrary, has refused to sell said physical plant and business
32 to this defendant at any price, and has, contrary to the terms and provisions of said contract, offered in writing to sell its physical plant and business to persons other than this defendant, and has refused and neglected to allow this defendant an opportunity to buy said plant and business under the terms and conditions of said Paragraph 8, or any other terms and conditions as might be just and reasonable to the parties *of* said contract and to

the consumers of said electric power; and on this behalf defendant alleges that he is now, and for some months last past has been, ready and willing to purchase the physical plant and business of said complainant, under the terms and conditions of paragraph 8 of said contract, or upon any such other terms and conditions as might be just and reasonable to the parties to said contract and to the consumers of said electric power, but that complainant has refused and neglected to accept the offer of defendant, or to treat with defendant, in any way, but on the contrary, has sought to dispose of its physical plant and business with persons other than defendant, and at a price far in excess of that provided for in said Paragraph 8, and far in excess of the true and proper value of the physical plant and business of said complainant;

IV.

That the said complainant has given this defendant a notice provided for in Paragraph 8 of said contract, stating the desire of said complainant to sell said electric light and power business to this defendant and said defendant has agreed to purchase said physical plant and business under the terms and conditions of said Paragraph 8;

33

V.

That under and by virtue of the terms and conditions of said Paragraph 8 of said contract, this defendant has a right, in the nature of an option, prior to that of any other person or corporation, to purchase the physical plant and business of said complainant in case said complainant desires to sell the same; that the said complainant in offering to sell its physical plant and business to persons other than this defendant, as heretofore alleged, has violated the terms and conditions of said contract;

VI.

That under and by virtue of the provisions of Paragraph 11 of said contract, it was mutually agreed between complainant and defendant, that in case of any disputes arising out of the terms of said contract and their execution, that within two weeks after a written notice of demand by either party to said contract, each party thereof shall choose one arbitrator, these to choose a third, and the judgment of these three shall be, in the matter and settlement of said dispute, final;

That under and in accordance with the provisions of said Paragraph 11, defendant did, on or about the 19th day of December, 1913, serve a written notice of demand upon complainant that said parties settle said differences by means of arbitration as provided in said Paragraph, and on this behalf defendant alleges that any and all differences existing between said parties can be amicably settled under the provisions of said Paragraph; defendant further alleges

that it is ready and willing to abide by the decision of arbitrators selected under said Paragraph 11;

34 VII.

That by reason of the breach of contract upon the part of said complainant, and its refusal to abide by the terms and conditions of said contract, this defendant, in order to protect its rights under said contract and to compel said complainant to perform the terms and conditions of said contract, and to sell its physical plant and property to this defendant under the terms and conditions of said contract, has filed an action in the Superior Court of the County of Napa against said complainant on the 12th day of March, 1914, to compel said complainant to convey to this defendant, its physical plant and business under the terms and conditions of said contract and to perform the terms and conditions of said contract;

VIII.

That under the terms and conditions of said contract, complainant is not a public utility, but is merely a sub-agent or middleman, selling electric power for and on behalf of this defendant, and as such is not a consumer within the meaning of the Public Utilities Act of this State; that said complainant is bound by the terms and conditions of said contract and that this Commission has no power to alter or change the provisions thereof; that this Commission in fixing the rate at which said complainant must sell electric power to the inhabitants of Calistoga and the vicinity thereof, has exhausted its jurisdiction; that the said complainant has a legal right to contract to buy electric power at whatever price it may choose, and having entered into said contract, is legally bound by the terms and conditions thereof;

35 IX.

That by reason of the premises, this Commission has no jurisdiction of this action or the subject matter thereof; that any action by this Commission, resulting in a change or alteration of said contract, or the terms and conditions therof, will impair the obligation of said contract in the violation of the provisions of Section 10, Article I of the Constitution of the United States, and of Section 16, Article I of the Constitution of this State;

Wherefore, defendant prays that this action be dismissed and that complainant take nothing thereby.

MILTON T. U'REN,
Attorney for Defendant, Room 511 Mechanics' Institute Building, San Francisco, California.

36 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

D. L. Beard being first duly sworn, deposes and says; that he is the President of the Napa Valley Electric Company, a corporation, the defendant above named, and that he makes this verification on behalf of such corporation; that he has read the foregoing Supplemental and Amended Answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

D. L. BEARD.

Subscribed and sworn to before me this 13th day of March, 1914.
[SEAL.] ROBERT R. RUSS,
Notary Public in and for the City and County of San Francisco, State of California.

37 EXHIBIT "E."

Case No. 508.

CALISTOGA ELECTRIC COMPANY

vs.

NAPA VALLEY ELECTRIC COMPANY.

Case No. 538.

In the Matter of the Investigation into the Rates of NAPA VALLEY ELECTRIC COMPANY for Electric Energy.

Decided May 21, 1914.

Complainant in case 508 alleges that the present rates for electrical energy purchased under contract from respondent are unjust and discriminatory, and petitions the Commission to fix a just and reasonable rate for such service; in Case 538 the Commission institutes upon its own initiative an investigation into the general rates of respondent now in effect.

Held, As stated in prior decisions, this Commission has the power to adjust existing contract rates if the contract results in discrimination. After thorough investigation, just and reasonable rates are prescribed for all classes of service furnished by respondent including a rate of 3 cents per kilwatt hour to Calistoga Electric Company, said rates to become effective June 1, 1914.

Raymond Benjamin, for Calistoga Electric Company.
Milton T. U'Ren, for Napa Valley Electric Company.

38 *Report of the Commission.*

THELEN, *Commissioner:*

The above entitled proceedings, which were consolidated for hearing and for decision, involve a determination of the rates to be charged by Napa Valley Electric Company for electric energy supplied to all of its customers.

The complaint in Case No. 508 alleges in effect that complainant, the Calistoga Electric Company, is engaged in the business of buying and selling electric energy in the town of Calistoga and vicinity, in Napa County; that Calistoga Electric Company receives its electric energy from defendant, Napa Valley Electric Company, at a point on the line of the Southern Pacific Company between St. Helena and Calistoga, known as Bale Station; that Calistoga Electric Company is the successor to the rights of one E. L. Armstrong, under a contract between Armstrong and Napa Valley Electric Company dated May 13, 1911, attached to the complaint and marked "Exhibit A," under which contract the Napa Valley Electric Company agrees to supply electric energy to Armstrong for distribution in Calistoga and adjacent territory, in Napa County, at the rates therein specified; that by reason of these rates being unduly high, Calistoga Electric Company can not supply electric energy to consumers at its existing rates except at a loss to the Company; that Napa Valley Electric Company discriminates against Calistoga Electric Company in rates charged for electric energy; and that Calistoga Electric Company is entitled to a reduction in rates under this Commission's Decision No. 289, rendered on October 18, 1912, in Application No. 83, Snow Mountain Water and Power Company (Vol. 1,
39 Opinions and Orders of the Railroad Commission of California, p. 784). The complainant asks that fair and reasonable rates be established, and that a refund be ordered of moneys paid by Calistoga Electric Company to Napa Valley Electric Company for electric energy in excess of the rates ordered established by said Decision No. 289.

The defendant, in Case No. 508, in its answer alleges that Calistoga Electric Company is merely distributing agent of Napa Valley Electric Company in the town of Calistoga and vicinity, under the terms of the contract dated May 13, 1911, between Armstrong and Napa Valley Electric Company. The answer denies specifically the material allegations of the complaint.

The Napa Valley Electric Company thereafter filed a supplemental and amended answer, setting up certain difficulties which the parties have had in the matter of a sale of the property of the Calistoga Electric Company, with which this Commission is not concerned in this proceeding. The supplemental and amended answer also sets up the claim that this Commission has no jurisdiction in the premises by reason of the fact that an existing contract has established the rates for electric energy to be supplied by Napa Valley Electric Company to E. L. Armstrong and his assignee, the Calistoga Electric Company. This Commission has several times held that there is no

merit in a claim of this kind. (See application of Murray and Fletcher, Vol. 2, Opinions and Orders of the Railroad Commission of California, p. 464, and Town of Ukiah vs. Snow Mountain Water and Power Company, Decision No. 1309, decided on February 27, 1914).

A question having arisen as to whether the Napa Valley Electric Company had distributed to its patrons the saving in the
40 amount paid by this company to the Snow Mountain Water and Power Company for electric energy, which saving resulted from this Commission's decision in the application of Snow Mountain Water and Power Company, hereinbefore referred to, and as to whether the rates charged by Napa Valley Electric Company are fair and reasonable rates, this Commission on January 24, 1914, instituted, on its own motion, an investigation into all the rates charged by Napa Valley Electric Company for electric energy, to which investigation Case No. 538 was assigned.

By agreement of all the parties, the hearings in these two proceedings were consolidated. The hearings were held in the City of San Francisco on March 18 and 21, 1914. Certain additional information which was to be supplied by Napa Valley Electric Company has now been furnished, and these cases are now ready for decision.

Napa Valley Electric Company was incorporated on September 10, 1907. It supplies gas within the town of St. Helena and electric energy in the towns of St. Helena, Rutherford, Oakville and Yountville all in Napa County, and also to Calistoga Electric Company for distribution in the town of Calistoga and certain territory adjacent thereto. The company's gas plant and electrical substation are both located on the same parcel of land in the town of St. Helena. The Company secures all its electric energy from the Snow Mountain Water and Power Company, the point of delivery being on said parcel of land. The electric energy there received from Snow Mountain Water and Power Company is transferred from 55,000 volts to 2,300 volts for local distribution and 6,600 volts for rural distribution. The local electric system consists of overhead lines supplying residential lighting and municipal series street lighting. There
41 are two rural lines, the one running north and the other south from St. Helena. The north line was constructed by Napa Valley Electric Company in 1911, to supply the Calistoga Electric Company, and extends some four miles to Bale Station, at which point delivery is made to Calistoga Electric Company. The line running south from St. Helena to Oak Knoll was constructed and is owned by Snow Mountain Water and Power Company, who have leased the line to Napa Valley Electric Company.

I shall now proceed under the following heads:

(1) Value of Property;

(2) Rate of Return;

(3) Depreciation;

(4) Operating and Maintenance Expenses;

(5) The Rate.

1. Value of Property.

This Commission's gas and electric rate department prepared a detailed inventory of all the property of the Napa Valley Electric Company and submitted its estimate of the cost of reproducing this property new, and also of the depreciated reproduction value. The inventory was accepted as correct by the Napa Valley Electric Company as were also the department's estimates of reproduction value new and of depreciated reproduction value, with the exception of a few items. The department's estimate did not include an item for franchises, as to which the department had been unable to ascertain the expenditures. Also, there was no item allowed for time and labor in acquiring rights of way. Allowances for both of these items will be made in the tables which follow. The Napa Valley Electric
42 Company also objected because the cost of the line of the Snow Mountain Water and Power Company from St. Helena to Oak Knoll had not been included in the inventory of the Napa Valley Company's property. It appears that this line is owned by the Snow Mountain Water and Power Company and is operated under lease by the Napa Valley Electric Company. This line was considered by this Commission in the application of the Snow Mountain Water and Power Company, hereinbefore referred to, as a part of that company's property on which it is entitled to a return. Consequently, it would not be fair to consider it also as a part of the property of the Napa Valley Electric Company in establishing the rates of that company. Allowance, however, will be made herein for all sums paid by Napa Valley Electric Company as rent of this line, and also for all expenses incurred by that company in connection with the operation and maintenance thereof for its business.

The following table shows the different items of the Napa Valley Electric Company's operative electric property, the basis of segregation of these items where a segregation is necessary, the estimated reproduction value new, the estimated depreciated reproduction value, the pro rata of the estimated reproduction value new assignable to street lighting, the pro rata on the same basis of reproduction new assignable to the service of the Calistoga Electric Company and the pro rata on the same basis assignable to the Napa Valley Company's other consumers:

Table No. I.

Segregation of Electric Capital.

No.	Item.	Basis of segregation.	Estimated re-value new. production	Estimated depreciated reproduction value.	Street lighting pro rata.	Calistoga pro rata. Company	Other consumers pro rata.
	Real estate	Demand	$1,900.00	$1,900.00	$32.90	$282.96	$1,584.14
	Franchises	Other charges	305.00	262.30	4.59	39.53	260.86
	Rights of way	Use and demand	476.00	476.00	....	366.24	109.76
	Poles and fixtures	Demand and consumers*	13,765.89	11,559.54	883.77	1,660.85	11,221.27
	Overhead system	Demand and consumers	8,779.55	7,653.10	886.14	994.99	6,898.42
	Substation building	Direct and demand	1,375.00	962.50	206.25	179.93	988.82
	Substation equipment	Direct and demand**	6,329.81	4,953.76	477.25	886.74	4,965.82
	Line transformers, etc.,	Demand of secondary consumers	4,318.96	3,640.56	....	189.78	4,129.18
	Electric services	Consumers	2,008.64	1,524.62	....	....	2,008.64
	Electric meters	Consumers	7,281.28	5,419.88	....	27.65	7,253.63
	Municipal street lights	Direct segregation	1,154.63	853.42	1,154.63	....	....
	Furniture and fixtures	Consumers	374.43	269.59	.79	.79	372.85
	Vehicles, etc.,	Consumers	1,969.69	983.29	4.15	4.15	1,961.39
	Tools and appliances	Investment and demand	165.65	91.11	15.05	23.20	127.40
	Testing instruments	Consumers	138.16	124.34	.29	.29	137.50
	Materials and supplies	Investment and demand	1,054.29	1,054.29	95.83	122.60	835.86
	Totals		$51,396.98	$41,728.30	$3,761.64	$4,779.70	$42,855.64

*Calistoga line prorated between Calistoga and other consumers on basis of lighting and power connected load corrected for respective diversities.

**Substation transformers prorated to street lighting on demand basis; poles and fixtures and overhead system on use basis.

44 It appears from Table No. I that the estimated reproduction value new of the total operative physical property used in connection with the Napa Valley Company's electrical business is $51,396.98, that the estimated depreciated reproduction value of this property is $41,728.30, that the estimated reproduction value new of the property assignable to the street lighting business is $3,761.64, and that the estimated reproduction value new of the property assignable to the service to the Calistoga Electric Company is $4,779.70.

Certain evidence was presented at the hearing with reference to the cost of developing the business, but the evidence is so unsatisfactory that it is impossible to make a finding on this point. In order to be absolutely fair to the Napa Valley Electric Company, I shall take the estimated reproduction value new of the physical properties as representing the basis on which a return shall be allowed in this case. While this amount is somewhat in excess of the amount which may hereafter be determined to be the proper basis, I think it wiser to err on the side of liberality. It is better to be a little too liberal now than to cut too deeply. This decision will not, of course, commit this Commission to the reproduction value new theory, which frequently produces unjust and unreasonable results.

2. Rate of Return.

The business of the Napa Valley Electric Company is relatively small and no very large increase in business can be looked for. In view of the liberal basis of return which has heretofore been established, I find that it would be reasonable to allow a rate
45 of return amounting to 8 per cent on the basis so ascertained.

3. Depreciation.

The following table shows the estimated reproduction value new, the estimated salvage value, the net depreciable value and the total depreciation annuity on each item of property devoted to the electric business, as well as the depreciation annuity, separately, on the property devoted to the street lighting business and to the service of the Calistoga Electric Company.

Table No. II.

Depreciation Table.

No.	Item.	Estimated reproduction value new.	Estimated salvage value.	Net depreciable value.	Total depreciation annuity.	Depreciation street lighting.	Depreciation Calistoga Company.	Depreciation other consumers.
	Real estate	$1,900.00	....	....	$....	$....	$....	$....
	Franchises	305.00	....	$305.00	4.59	.07	0.59	3.93
	Rights of way	476.00	....	476.00	14.39	....	11.08	3.31
	Poles and fixtures	13,765.89	825.95	12,939.94	564.70	40.95	76.96	446.79
	Overhead system	8,779.55	3,072.84	5,706.71	172.57	13.34	14.96	144.26
	Substation buildings	1,375.00	13.75	1,361.25	28.52	4.32	3.77	20.43
	Substation equipment	6,329.81	632.98	5,696.83	119.35	10.00	18.58	90.77
	Line transformers, etc.,	4,318.96	431.89	3,887.07	117.54	....	5.74	111.80
	Electric services	2,008.64	602.59	1,406.05	65.16	....	....	65.16
	Electric meters	7,281.28	72.81	7,208.47	304.70	....	1.17	303.53
	Municipal street lights	1,154.63	57.73	1,096.90	50.83	50.83	....	....
	Furniture and fixtures	374.43	37.44	336.99	15.62	.04	.04	15.54
	Vehicles, etc.,	1,969.69	196.96	1,772.73	320.86	.75	.75	319.36
	Tools and appliances	165.65	16.57	149.08	26.98	2.72	4.20	20.06
	Testing instruments	138.16	27.63	110.53	8.79	.03	.03	8.73
	Materials and supplies	1,054.29	....	....	....	....	....	....
	Totals	$51,396.98	$5,989.14	$42,453.55	$1,814.60	$123.05	$137.88	$1,553.67

47 4. Operating Expenses and Maintenance.

The following table shows the operating expenses, exclusive of purchased energy and taxes, of the Napa Valley Electric Company for the year 1913, segregated as between the gas business, the electrical business, the appliance business, street lighting and the service to the Calistoga Electric Company:

(Here follows paster marked page 48.)

Table No. III.

Segregation of Operating Expense.

(Exclusive of Purchased Energy and Taxes.)

No.	Amount.	Basis of segregation.	Total.	Gas business.	Appliance business.	Electric business.	Street lighting pro rata.	Calistoga pro rata.	Other consumers pro rata.
	Distribution lines	Demand and consumers	$828.34	$....	$....	$828.34	$75.30	$96.34	$656.70
	Substation expense	Demand	3.49	....	....	3.49	.08	.69	2.72
	Municipal lighting	Direct expense	26.26	....	....	26.26	26.26	....	....
	Commercial dept.	Consumers	353.96	71.05	83.96	198.95	.40	.40	198.15
	Collection expense	Consumers	105.98	27.89	....	78.09	.16	.16	77.77
	Genl. officers' salaries	Expense and revenue	3,600.00	774.83	....	2,925.17	24.57	185.77	2,614.83
	Miscellaneous genl. exp.	Consumers	1,111.72	223.16	263.70	624.86	1.31	1.31	622.24
	Railroad commission exp.	Direct expense	12.50	....	....	12.50	.09	.72	11.69
	Injuries and damage	Direct expense	59.04	....	....	59.04	.52	3.95	54.57
	Fire insurance	Demand	121.89	39.00	....	82.89	1.44	12.34	69.11
	Liability insurance	Direct expense	509.11	47.25	....	461.86	4.00	30.19	427.67
	Automobile expense	10 per cent to gas demand and consumers	676.69	67.67	....	609.02	3.59	23.54	581.89
	Extraordinary repairs	Demand	114.87	....	....	114.87	1.97	16.93	95.97
	Corporation tax	Revenue—direct	50.00	4.95	13.52	31.53	.29	1.45	29.79
	Rent of poles	Demand	22.00	....	....	22.00	.37	3.17	18.45
	Office rent	Consumers	116.50	23.39	27.63	65.48	.14	.14	65.20
	Totals		$7,712.35	$1,279.19	$388.81	$6,044.35	$140.49	$377.10	$5,526.76

49 It will be observed that of the total operating expenses chargeable in whole or in part of this company's electric business, not including the price of current purchased and taxes, amounting to $7,712.35, the sum of $1,279.19, is chargeable to the gas business. On the same basis, the operating expenses chargeable to the street lighting business amount to $140.49, and those chargeable to the service to the Calistoga Company amount to $377.10.

Before leaving the item of operating expenses, I desire to draw attention to the item of general officers' salaries. The salaries which were paid to general officers during the years 1913 and 1914 appear in the following table:

Table No. IV.

	1913.		1914.	
	Monthly.	Annually.	Monthly.	Annually.
President	$50.00	$600.00	$100.00	$1200.00
Vice-President	2.50	30.00	20.00	240.00
Secretary	2.50	30.00	95.00	1140.00
General Manager	100.00	%1846.13	150.00	1800.00
Treasurer	2.50	30.00	20.00	240.00
Director	2.50	30.00	20.00	240.00
Totals	$160.00	$2566.13	$405.00	$4860.00

It will be noted from the foregoing table that the salary of the president was increased 100 per cent, that of three directors 700 per cent and that of the secretary 3,700 per cent. I find from the evi-
50 dence in this proceeding that the increase in the president's salary is justified; but that the allowance for directors should not exceed the amount of $120.00 annually, based on one meeting per month, and that the allowance for the secretary, based on his actual services to the company, should not exceed the amount of $240.00 annually. On this basis, the allowance for salaries of general officers amounts to $3,600.00, annually which amount I consider to be liberal.

In making the segregation of operating expenses between the gas and electrical business, we have concluded that it would be unfair to make the segregation on the basis of the number of consumers and that it would be equally improper to make the segregation on the basis of the amount of money invested in these respective classes of utility service. It would appear that the gas business is relatively unprofitable, and it is clear that if the Napa Valley Electric Company should go out of the gas business and should confine itself to the electric business, the operating expenses chargeable to that business would be materially greater than is now the case. As the electrical business is the chief portion of the company's business, and as the gas business plays a relatively subsidiary part, the Commission is of the opinion that it would be unfair to load operating expenses on to the gas business further than the foregoing facts justify;

5. The Rate.

The classes of electrical service performed by the Napa Valley Electric Company include both residential and commercial lighting, municipal lighting, industrial power, agricultural power, the service to the Veterans' Home, and the service to the Calistoga Electric Company. It will now be necessary to ascertain a fair and reasonable rate to be charged for each of these classes of service.

51

The rates at present charged by Napa Valley Electric Company for electric service are as follows:

Table No. V.

Electric Current for Light.

Minimum Bill, $1.00 per Month.

20 kilowatt hours or under, $.09 per kilowatt hour.
100 kilowatt hours or under, if over 20, .085 per kilowatt hour.
200 kilowatt hours or under, if over 100, .08 per kilowatt hour.
250 kilowatt hours or under, if over 200, .075 per kilowatt hour.
300 kilowatt hours or under, if over 250, .07 per kilowatt hour.
350 kilowatt hours or under, if over 300, .065 per kilowatt hour.

Electric Current for Power.

Minimum Bill, $1.00 per Month.

600 kilowatt hours or under, .05 per kilowatt hour.
700 kilowatt hours or under, if over 600, .04½ per kilowatt hour.
800 kilowatt hours or under, if over 700, .04¼ per kilowatt hour.
900 kilowatt hours or under, if over 800, .04 per kilowatt hour.
1000 kilowatt hours or under, if over 900, .03½ per kilowatt hour.
2000 kilowatt hours or under, if over 1000, .03 per kilowatt hour.
3000 kilowatt hours or under, if over 2000, .02½ per kilowatt hour.
Over 3000 kilowatt hours, .02¼ per kilowatt hour.

Electric Current for Cooking.

Minimum Bill, $3.00 per Month.

Rate, .04 per kilowatt hour.

52

Electric Current for Irrigation.

Minimum Bill, $1.00 per Month.

Rate	.02½	per kilowatt hour
Calistoga Electric Light Company	.0425	per kilowatt hour
Town of St. Helena street lighting system	.06	per kilowatt hour
Veterans' Home	.025	per kilowatt hour

The following table shows the cost of service for the Napa Valley Company's electric customers other than municipal street lighting and Calistoga Electric Company:

Table No. VI.

2

Cost of Service.

Average for All Consumers Except Municipal Street Lighting and Calistoga Electric Company.

Investment	$42,855.64
Interest at 8 per cent	3,428.45
Depreciation annuity	1,553.67
Operating expense	5,526.76
Purchased energy (1.1c per kilowatt hour, 35.31 per cent average losses) 1913 basis	4,191.47
Taxes (4.6 per cent on grand revenue)	712.12
Total cost	$15,412.47
Average cost per kilowatt hour (1913 basis)	$ 0.05331

The following table shows the cost of service for the municipal street lighting service in St. Helena:

Table No. VII.

Cost of Street Lighting Service in St. Helena.

53

Investment	$3,761.64
Interest at 8 per cent	300.93
Depreciation annuity	123.05
Operating expense	140.49
Purchased energy (1.1c, per kilowatt hour, 14.82 per cent losses)	206.60
Taxes (4.6 per cent on grand revenue)	37.18
Total cost	$ 808.25
Total cost per kilowatt hour	$ 0.05052

The following table shows the cost of the service rendered to the Calistoga Electric Company:

Table No. VIII.

Cost of Calistoga Service.

Investment	$4,779.70
Interest at 8 per cent	382.39
Depreciation annuity	137.88
Operating Expense	377.10
Purchased energy (1.1c per kilowatt hour, 14.82 per cent losses)	694.72
Taxes (4.6 per cent on grand revenue)	76.77
Total Cost	$1,668.86
Total cost per kilowatt hour (1913 basis)	$ 0.03102

54 From a careful consideration of all the evidence in this case, I find that the rates shown in the following table are fair and reasonable rates for the different classes of electric service performed by the Napa Valley Electric Company and that they should be established by said Company:

Table No. IX.

Schedule "A", General Lighting.

Applicable to all consumers of electric energy for lighting and domestic purposes. Energy deliverable at the voltage of the company's secondary distribution line.

9c per kilowatt hour for first 20 kilowatt hours per month per meter.
5c per kilowatt hour for next 500 kilowatt hours per month per meter.
Minimum charge: $1.00 per meter per month.

Schedule "B". General Industrial Power.

Applicable to all consumers of electric energy for power purposes where the installation is one horsepower or over. Energy deliverable at the voltage of the company's secondary distribution lines. First 60 kilowatt hours per horse power per month—

1 horsepower and less than 5 horsepower—5c per kilowatt hour
5 horsepower and less than 15 horsepower—4½c per kilowatt hour
15 horsepower and less than 35 horsepower—4c per kilowatt hour
35 horse power and over ..... 3½c per kilowatt hour
Next 90 kilowatt hours per horsepower per month, 2½c per kilowatt hour.

Next 150 kilowatt hours per horsepower per month, 2c per kilowatt hour.
Next 300 kilowatt hours per horsepower per month, 1¾c per kilowatt hour.
Minimum charge: $1.00 per horsepower per month for first 5 horsepower.
.70 per horsepower per month for all over 5 horsepower.

55 Schedule "C." Primary Industrial Power.

Applicable to all consumers of electric energy for power purposes where the installation is one horsepower or over. Energy deliverable at the voltage of the company's primary distribution lines.

First 60 kilowatt hours per horsepower per month:

1 horsepower and less than 5 horsepower...4½c per kilowatt hour
5 horsepower and less than 15 horsepower...4 c per kilowatt hour
15 horsepower and less than 35 horsepower...3½c per kilowatt hour
35 horsepower and over.....3 c per kilowatt hour
Next 90 kilowatt hours per horsepower per month 2 c per kilowatt hour
Next 150 kilowatt hours per horse power per month 1¾c per kilowatt hour
Over 300 kilowatt hours per horsepower per month 1½c per kilowatt hour
Minimum charge: 80c per horsepower per month for first 5 horsepower
60c per horsepower per month for all over 5 horsepower

Schedule "D." General Seasonal Power.

Applicable to all consumers of electric energy for power purposes where the use is seasonal and where the installation is one horsepower or over. Energy deliverable at the voltage of the company's secondary distribution lines.

First 60 kilowatt hours per horsepower per month:

1 horsepower and less than 5 horsepower...5 c per kilowatt hour
5 horsepower and less than 15 horsepower...4½c per kilowatt hour
15 horsepower and less than 35 horsepower...4 c per kilowatt hour
35 horsepower and over,.....3½c per kilowatt hour
Next 90 kilowatt hours per horsepower per month 2½c per kilowatt hour
Next 150 kilowatt hours per horsepower per month 2 c per kilowatt hour
Over 300 kilowatt hours per horsepower per month 1¾c per kilowatt hour
Minimum charge: $10.00 per horsepower per year for first 5 horsepower
7.00 per horsepower per year for all over 5 horsepower

56 Schedule "E." Primary Seasonal Power.

Applicable to all consumers of electric energy for power purposes where the use is seasonable and where the installation is one horsepower or over. Energy deliverable at the voltage of the company's primary distribution lines.

First 60 kilowatt hours per horsepower per month:

1 horsepower and less than 5 horsepower...4½c per kilowatt hour
5 horsepower and less than 15 horsepower...4 c per kilowatt hour
15 horsepower and less than 35 horsepower...3½c per kilowatt hour
35 horsepower and over.....3 c per kilowatt hour
Next 90 kilowatt hours per month.....2 c per kilowatt hour
Next 150 kilowatt hours per month.....1¾c per kilowatt hour
Over 300 kilowatt hours per month.....1½c per kilowatt hour
Minimum charge: $9.00 per horsepower per year for the first 5 horsepower
$6.00 per horsepower per year for all over 5 horsepower

Schedule "F."

Municipal street lighting,.....5c per kilowatt hour

Schedule "G."

Calistoga Electric Company,.....3c per kilowatt hour

57 Before concluding, I desire to comment on a few of the rates shown in the foregoing table. The top rate for general electric lighting remains as before, viz., 9 cents per kilowatt hour for the first 20 kilowatt hours per month per meter, but a reduction is made in electric energy consumed in excess of 20 kilowatt hours per month per meter.

While the general rate for agricultural power service remains about as before, an increase is made in the minimum charge. This minimum has been $1.00 per meter per month, entirely irrespective of the installation, and it is clear that this rate has been below the cost of service. A minimum is accordingly established on the basis of the horsepower of installation, in accordance with the usual practice. The rate for municipal street lighting is reduced from 6 cents to 5 cents per kilowatt hour. While the cost per kilowatt hour, according to Table No. VII, is $.05052, the slight increase in business which may be expected during the ensuing year justifies the flat rate of 5 cents per kilowatt hour. The same reason accounts for the establishment of the price of 3 cents per kilowatt hour for the service to the Calistoga Electric Company. If the Napa Valley Electric Company and the Calistoga Electric Company can agree on a rate different from that herein established for this service, including a minimum, on such basis that the result over a series of years will be practically the same as that herein contemplated, the parties may

make joint application to this Commission for authority to establish a rate on a basis different from that herein established. The rate now in effect for the Veterans' Home appears to be below the cost of service. As this institution is a state institution, the Napa Valley Electric Company has the right to give to this institution such
58 concessions as it desires to establish, but it does not have the right to charge against its other consumers such loss as may result from its generosity to the State. Accordingly, the rates herein established for other consumers are based on the cost of service to them and do not cover such loss as may occur in the service to the Veterans' Home. If the Napa Valley Electric Company desires to serve this customer at less than the cost of service, it must do so at its own expense.

The following table shows the revenue required by Napa Valley Electric Company from its electric service on the basis hereinbefore indicated, and the estimated revenue from the rates herein established, for the year 1914. The estimated revenue is based on general lighting consumption for the month of March, 1914, and for the consumption for other classes of business during the year 1913, with the addition of the added revenue to be secured from the establishment of the agricultural power minimum hereinbefore referred to:

Table No. X.

Effect of Proposed Rates.

Required Revenue.

Interest at 8 per cent	$4,111.76
Depreciation annuity	1,814.60
Operating expense	6,044.35
Purchased energy (1913)	5,092.79
Taxes (4.6 per cent on grand revenue)	822.76
Total,	$17,886.26

59 Estimated Revenue.

General Lighting (March, 1914)	$9,431.29
Municipal lighting, etc. (1913)	1,456.85
Industrial power (1913)	1,281.53
Agricultural power (1913)	1,292.82
Excess due to power minimum	846.00
Veterans' Home (1913)	2,352.10
Calistoga (1913)	1,668.86
Total	18,329.45

60 I submit herewith the following form of order:

Order.

Public hearings have been held in the above entitled proceedings, and the same having been submitted and being now ready for decision, the Commission hereby finds as a fact that the existing rates of the Napa Valley Electric Company for electric service are unjust and unreasonable in so far as they differ from the rates herein established, and also finds as a fact that the rates herein established are fair and reasonable rates for the electric service of the Napa Valley Electric Company.

Basing its order on the foregoing findings of fact and on the other findings which are contained in the opinion which precedes this order, the Railroad Commission hereby orders Napa Valley Electric Company to establish and to file with this Commission the following rates for its electric service:

Schedule "A." General Lighting.

Applicable to all consumers of electric energy for lighting and domestic purposes. Energy deliverable at the voltage of the company's secondary distribution lines.

9¢ per kilowatt hour for first 20 kilowatt hours per month per meter
5¢ per kilowatt hour for next 500 kilowatt hours per month per meter
Minimum charge.....$1.00 per meter per month

Schedule "B." General Industrial Power.

Applicable to all consumers of electric energy for power purposes where the installation is one horsepower or over. Energy deliverable at the voltage of the company's secondary distribution lines.

61 First 60 kilowatt hours per horsepower per month—

1 horsepower and less than 5 horsepower, 5¢ per kilowatt hour.
5 horsepower and less than 15 horsepower, 4½¢ per kilowatt hour.
15 horsepower and less than 35 horsepower, 4¢ per kilowatt hour.
35 horsepower and over, 3½¢ per kilowatt hour.

Next 90 kilowatt hours per horsepower per month, 2½¢ per kilowatt hour.

Next 150 kilowatt hours per horsepower per month, 2¢ per kilowatt hour.

Over 300 kilowatt hours per horsepower per month, 1¾¢ per kilowatt hour.

Minimum charge, $1.00 per horsepower per month for first 5 horsepower.
.70 per horsepower per month for all over 5 horsepower.

Schedule "C." Primary Industrial Power.

Applicable to all consumers of electric energy for power purposes where the installation is one horsepower or over. Energy deliverable at the voltage of the company's primary distribution lines.

First 60 kilowatt hours per horsepower per month—

1 horsepower and less than 5 horsepower, 4½¢ per kilowatt hour.
5 horsepower and less than 15 horsepower, 4¢ per kilowatt hour.
15 horsepower and less than 35 horsepower, 3½¢ per kilowatt hour.
35 horsepower and over, 3¢ per kilowatt hour.
Next 90 kilowatt hours per horsepower per month, 2¢ per kilowatt hour.
Next 150 kilowatt hours per horsepower per month, 1¾¢ per kilowatt hour.
Over 300 kilowatt hours per horsepower per month, 1½¢ per kilowatt hour.
Minimum charge, $1.80 per horsepower per month for first 5 horsepower.
.60 per horsepower per month for all over 5 horsepower.

Schedule "D." General Seasonal Power.

Applicable to all consumers of electric energy for power purposes where the use is seasonal and where the installation is one horsepower or over. Energy deliverable at the voltage of the company's secondary distribution lines.

62 First 60 kilowatt hours per horsepower per month—.

1 horsepower and less than 5 horsepower, 5¢ per kilowatt hour.
5 horsepower and less than 15 horsepower, 4½¢ per kilowatt hour.
15 horsepower and less than 35 horsepower, 4¢ per kilowatt hour.
35 horsepower and over, 3½¢ per kilowatt hour.
Next 90 kilowatt hours per horsepower per month, 2½¢ per kilowatt hour.
Next 150 kilowatt hours per horsepower per month 2½¢ per kilowatt hour.
Over 300 kilowatt hours per horsepower per month, 1¾¢ per kilowatt hour.
Minimum charge, $10.00 per horsepower per year for first 5 horsepower.
7.00 per horsepower per year for all over 5 horsepower.

Schedule "E." Primary Seasonal Power.

Applicable to all consumers of electric energy for power purposes where the use is seasonal and where the installation is one horsepower or over. Energy deliverable at the voltage of the company's primary distribution lines.

First 60 kilowatt hours per horsepower per month—

1 horsepower and less than 5 horsepower, 4½¢ per kilowatt hour.
5 horsepower and less than 15 horsepower, 4¢ per kilowatt hour.
15 horsepower and less than 35 horsepower, 3½¢ per kilowatt hour.
35 horsepower and over, 3¢ per kilowatt hour.
Next 90 kilowatt hours per horsepower per month, 2¢ per kilowatt hour.
Next 150 kilowatt hours per horsepower per month, 1¾¢ per kilowatt hour.
Over 300 kilowatt hours per horsepower per month, 1½¢ per kilowatt hour.
Minimum charge, $9.00 per horsepower per year for the first 5 horsepower.
6.00 per horsepower per year for all over 5 horsepower.

Schedule "F."

Municipal street lighting, 5¢ per kilowatt hour.

Schedule "G."

Calistoga Electric Company, 3¢ per kilowatt hour.

The rates herein established shall become effective on June first, 1914.

63 The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 21st day of May, 1914.

64 EXHIBIT "F."

This memorandum of agreement entered into this 15th day of September, 1914, by and between Napa Valley Electric Co., a corporation existing under the laws of the State of California, and having its principal place of business at Napa, Napa County, California, and Calistoga Electric Co., a corporation existing under the laws of the State of California, and having its principal place of business at Calistoga, Napa County, California, (being the successor in interest to E. L. Armstrong, of the same place) supplementary to Agreement

between the said Napa Valley Electric Co., and the said E. L. Armstrong, dated at Napa, California, May 13, 1911, witnesseth,

1. That from and after the first day of May, 1914, the rates to be charged by the Napa Valley Electric Co., to the Calistoga Electric Co. shall, subject to approval of Railroad Commission of California, be as follows:

For lighting ..... .0240 per kw.
For power ..... .0175 per kw.

2. Commencing May 1, 1916, the foregoing rates shall be based upon an annual minimum consumption of 180,000 kw. for lighting and 60,000 kw. for Power.

3. Current used in any calendar month shall be paid for on or before the tenth day of the next succeeding month.

4. After May 1, 1916 in monthly settlements if less current is used in any month than one-twelfth of the annual minimum as provided in Article 2 of this contract, Calistoga Electric Company agrees to pay for such one-twelfth of said minimum. However, if in any month of any given year dating from May 1, 1916,
65 Calistoga Electric Company shall use current in excess of such one-twelfth of such annual minimum such excess shall stand as a credit against the amount paid for current though not actually taken in any months of that year.

However, no excess of current used in any year between the first day of May, and the last day of April of succeeding calendar year shall be considered in relation to any preceding year, it being understood that each year shall stand by itself.

In all other respects the contract of May 13, 1911, is hereby confirmed and re-enacted.

In witness whereof, Napa Valley Electric Co. has at a special meeting of its directors, held on the fifteenth day of September, 1914, authorized and instructed its President and Secretary to execute this contract as its corporate act, to sign the same and affix the corporate seal hereto. And Calistoga Electric Co. at a special meeting of its directors held on the fifteenth day of September, 1914, has authorized and instructed its President and Secretary to execute this contract as its corporate act, to sign the same and affix the corporate seal hereto.

NAPA VALLEY ELECTRIC COMPANY,
By D. L. BEARD, [SEAL.]
Pres.
By H. J. LEWELLING,
Sec'y.
CALISTOGA ELECTRIC COMPANY,
By C. W. WALLER, [SEAL.]
Pres.,
By W. J. McLEAN,
Sec'y.

66 EXHIBIT "G."

Case No. 508.

CALISTOGA ELECTRIC COMPANY

vs.

NAPA VALLEY ELECTRIC COMPANY.

In the Matter of the Investigation into the Rates of Napa Valley Electric Company for Electric Energy.

Case No. 538.

CALISTOGA ELECTRIC COMPANY

vs.

NAPA VALLEY ELECTRIC COMPANY.

Case No. 967.

Decided November 15, 1916.

Report of the Commission.

On May 21, 1914, by Decision No. 1530, Vol. 4, Opinions and Orders of the Railroad Commission of the State of California, page 1061, this commission in fixing the rates to be charged by Napa Valley Electric Company authorized that company to charge Calistoga Electric Company for electric current at the rate of 3 cents per kilowatt hour.

Case No. 967 is brought by Calistoga Electric Company for the purposes, among others, of having this rate materially modified and of having this commission declare null and void two instruments signed by complainant, one being a contract for the purchase of energy by Calistoga Electric Company from Napa Valley
67 Electric Company, the other a purported option executed by complainant in favor of defendant. Napa Valley Electric Company has, on its part, filed a petition for a supplemental order under Cases Nos. 508 and 538, praying that said contract for the purchase of power from defendant by Calistoga Electric Company, at the rates hereinafter set forth, be approved by this Commission.

A public hearing was held at San Francisco, August 25, 1916, at which time all the above-mentioned cases were consolidated, with the consent of the interested parties.

From the evidence it appears that in 1914, soon after defendant's rates had been determined by this commission, complainant and defendant signed a contract fixing the rates for electric energy furnished complainant by defendant as follows:

For Lighting ..... 2.4 cents per kilowatt hour.
For Power ..... 1.75 cents per kilowatt hour.

As will be seen this rate was considerably lower than that fixed by the commission, but the agreement contained a provision that commencing with May 1, 1916, the said rates should be based upon the annual minimum consumption by complainant of 180,000 kilowatt hours for lighting and 60,000 kilowatt hours for power. The agreement further provided that the rate so fixed should be subject to the approval of the Railroad Commission, and it was further agreed between the parties that complainant should take the necessary steps for obtaining such approval. It was the intention of the parties that this rate was to date back to May 1, 1914, and defendant, accordingly, proceeded to charge complainant at the rate set forth in said contract for all energy furnished complainant between May 1, 1914, and June 26, 1916.

The total amount collected from complainant during this period upon the basis of the reduced rate was $7,210.65,
68 whereas defendant would have been entitled under the 3 cent rate established by the commission to $9,613.59, or $2,516.15 over the amount actually collected.

No steps were taken for obtaining the approval of this commission to the proposed contract until about January 15, 1915, when complainant and defendant filed an informal application, asking that the commission approve the new rates set forth, together with the annual minimum consumption guaranteed by said contract. The application further stated among other matters, that it was the intention of the parties that the provision regarding minimum consumption should become effective May 1, 1916. The commission never either approved or disapproved said contract, and as it was a modification of the rate formally established by the commission, and a modification which might result in either decreasing or increasing the legal rate according to the amount of energy consumed by complainant, the modified rates thus sought to be established, but which were never approved by the commission, never became effective; and we find that the legal rate which complainant should have paid defendant for all electric energy obtained from defendant since the effective date of Decision No. 1530 (supra) is 3 cents per kilowatt hour.

Complainant now finds that its business has not increased as rapidly as it expected it would at the time it signed the above mentioned contract. Instead of using 240,000 kilowatt hours during the twelve months commencing with May 1, 1916, complainant is apparently using only about 170,000 kilowatt hours. If it should now pay defendant for its energy upon the basis of the minimum consumption guaranteed by said contract, it would have to pay a total minimum of $5,370.00 per year, which under the present
69 estimated consumption gives an average of cost to complainant for this year of $.0316 per kilowatt hour.

It would obviously not be fair to defendant to permit complainant to enjoy the advantages under the aforementioned contract and then to relieve it from the burdens, now that the time for the guaranteed minimum consumption has arrived, but as the contract was never binding upon the parties, owing to their failure to have obtained the

approval of this commission, there is no reason to prevent this commission from determining a just rate for the electric energy to be furnished complainant henceforth, upon the distinct understanding that complainant shall reimburse defendant for the difference between the amount paid under the agreed rate and the amount to which defendant was entitled under the legal rate of 3 cents per kilowatt hour.

Complainant's request for a modification of the rate established by this commission in 1914 is entirely reasonable, as both defendant's business and complainant's consumption has increased materially since that time.

Arthur F. Bridge, one of the commission's engineers, has compiled an estimate of the reproduction cost new of that portion of defendant's property, used in its electric business, by adding to his appraisal as of March 1, 1914, (introduced at the former hearing of Cases 508 and 538), the book figures for additions and betterments to capital, obtained from the annual reports of defendant on file with this commission. This estimate is as follows:

Account.		'14, assumed same 1/1/14. As of Mar. 1,	Jan. 1, '14, to Dec. 31, '15. Add. and bett.,	Total Jan. 1, '16.
C- 2	Franchise (electric)	305.00	.....	305.00
C- 5	Land devoted to electric operations—			
	B. Land devoted to trans. operations	1,900.00	.....	1,900.00
	C. Land devoted to dist. operations	476.00	3.00	479.00
C-14	Poles and fixtures—			
	B. Distribution	13,765.89	10,680.02	24,445.91
C-15	Overhead system—			
	B. Distribution	8,779.55	2,741.38	11,520.93
C-17	Substation bldgs and gen'l struc.—			
	A. Transmission	1,375.00	.....	1,375.00
C-18	Substation equipment—			
	A. Transmission	6,329.81	.....	6,329.81
C-20	Line transformers and devices	4,318.96	3,929.71	8,248.67
C-21	Electric services	2,008.64	.....	2,008.64
C-22	Meters	7,281.28	2,103.16	9,384.44
C-23	Municipal St. lighting system	1,154.63	113.87	1,268.50

Account.	As of Mar. 1, '14, assumed same 1/1/14.	Add. and bett., Jan. 1, '14, to Dec. 31, '15.	Total Jan. 1, '16.
C-28 General equipment—			
A. General office eq.	374.43	417.79	792.22
B. General shop eq.	.....	612.12	612.12
D. General stable and gar. equipment	1,969.69	.....	1,969.69
E. Misc. equipment	303.81	550.41	854.22
Total fixed capital	.....	.....	71,494.15
Material and supplies	1,054.29	.....	*282.11
Subtotal	51,396.98	.....	71,776.26
Working cap. 2 mos. op. exp. $9,576.57/6	.....	.....	1,600.00
Total	.....	.....	$73,376.26

*Present balance sheet figure.

The total depreciation upon this property amounts to $2,433.00 per year, while interest at the rate of 8 per cent would amount to $5,870.00 per year. From the foregoing table and from the information on file with this commission in its annual reports, we find the fixed cost of defendant's service to complainant, including interest, depreciation and operating expenses exclusive of energy cost, to amount, for the year 1916, to approximately $1,002.00, to which must be added the energy cost, including losses and
71 taxes of 1.298 cents per kilowatt hour.

Under all the circumstances we find that the following would be reasonable rates to be charged complainant by defendant:

For the first 15,000 kilowatt hours per month ..... 2 cents per K. W. H.
For all energy in excess of 15,000 kilowatt hours per month ..... 1.7 cents per K. W. H.

The application of the above rate to defendant's 1915 operations would yield it a total revenue of $3,221.00 for energy furnished complainant, as compared with a total cost for said service of approximately $3,100.00, including interest at 8 per cent and a liberal allowance for depreciation.

As to complainant's request to have this commission declare null and void the purported option signed by complainant, the relief prayed for is entirely outside of this commission's jurisdiction.

Order.

A public hearing having been held in the above-entitled cases, at which oral and written evidence was introduced by the respective parties, and the matters now being ready for decision, the Railroad Commission hereby finds that the legal rate for electric energy furnished by defendant from May 1 to June 1, 1914, was $4.25 cents per kilowatt hour and that the legal rate for said energy from June 1, 1914, to date was and is 3 cents per kilowatt hour.

The commission further finds that under present conditions the existing rate is excessive and unreasonable, and that the rates hereinafter authorized are just and reasonable. Basing its decision upon the foregoing findings of fact and upon the other findings contained in the opinion which precedes this order.

72 It is hereby ordered that Napa Valley Electric Company shall establish and file with this commission the following rates for its electric service to Calistoga Electric Company:

For the first 15,000 kilowatt hours per month ..... 2 cents per kilowatt hour
For all energy in excess of 15,000 kilowatt hours per month..... 1.7 cents per kilowatt hour

The rates herein established shall become effective on December 1, 1916.

Dated at San Francisco, California, this 15th day of November, 1916.

73 EXHIBIT "H."

Before the Railroad Commission of the State of California.

Case No. 508.

CALISTOGA ELECTRIC COMPANY, Complainant,

vs.

NAPA VALLEY ELECTRIC COMPANY, Defendant.

Case No. 538.

In the Matter of the Investigation Into the Rate of Napa Valley Electric Company for Electric Energy.

Case N. 967.

CALISTOGA ELECTRIC COMPANY, Complainant,

vs.

NAPA VALLEY ELECTRIC COMPANY, Defendant.

Petition for Rehearing.

To the Railroad Commission of the State of California:

The petition of the Napa Valley Electric Company, a corporation, for a rehearing in the above entitled matters, respectfully shows:

That on the 15th day of November, 1916, this Commission made and rendered its opinion and order in the above entitled proceedings, which had been consolidated for hearing and decision, wherein and whereby said Commission fixed the price to be charged by the
74 Napa Valley Electric Company for electric energy furnished to the Calistoga Electric Company, a corporation.

That the charges so fixed in the said order were different from and less than those fixed in the order of said Commission made and entered on the 21st day of May, 1914, in Case No. 508 and Case No. 538, two of the above entitled proceedings.

That your petitioner is dissatisfied with said opinion and order of said Commission and does hereby petition for a rehearing upon the separate and distinct grounds hereinafter set forth.

I. The Order was Based upon Evidence Not Produced at the Hearing and Concerning which Petitioner Had No Opportunity of Cross-examination.

It will be remembered that at the hearing it was stipulated that the Commission might proceed upon further data to be furnished

it by its engineers with the distinct understanding that Mr. Mielenz, the general manager, and the attorneys for the Napa Company would have an opportunity to check up the figures and point out any defects or errors therein contained and to present, if necessary, other and additional data to controvert the same. Relying upon this understanding, your petitioner has several times been to the office of this Commission for the purpose of securing a copy of the data furnished by your engineering department for the purpose of checking up the same and pointing out errors and, if necessary, of presenting additional evidence in rebuttal thereof. We have been unable to secure this evidence notwithstanding the understanding upon which we submitted our case. Instead of furnishing us with these figures we received a letter from your Engineer refus-
75 ing to give us the same. A copy of this letter, marked "Exhibit A," is attached hereto and is hereby made a part hereof. We respectfully submit that the reasons given in this letter for refusing this information is in direct violation of the understanding upon which our case was submitted and is further in direct violation of the rules of evidence controlling the proceedings in every judicial inquiry. We are, of course, familiar with the rule in the case of Chicago, Burlington and Quincy Railroad Co. v. Babcock, 204 U. S. 585, and that line of cases, but it has no application here. The figures and data which we request do not constitute the reasoning upon which the Commission proceeded, but are the evidence upon which the Commission acted. No litigant can be precluded from the right to be confronted with the evidence upon which any court of justice proceeds and the right of cross examining the person producing that evidence. We have been deprived of that right in this case and submit that upon that ground alone a rehearing should be granted herein.

II. The Rates Fixed in said Order Do Not Provide for a Reasonable Return upon the Property of Petitioner Devoted to the Business of the Calistoga Electric Company.

We are confident that the data submitted by the Engineering Department of the Commission is erroneous and that if given an opportunity to examine the same we can point out defects therein which will lead the Commission to another and different result than that set forth in the order made in this case. The opinion and order of the Commission does not set forth the segregation of operating expenses and does not show the pro-rata chargeable to the
76 Calistoga Company. The only data set forth by the Commission in its opinion and order is contained upon page 5 and that data merely states the total investment of the company engaged in all branches of its business. No segregation to the Calistoga Company is attempted. The basis of the rates fixed by the Commission is stated (pp. 5 & 6) as follows:

"From the foregoing table and from the information on file with this Commission in its annual reports, we find the fixed cost of defendant's service to complainant, including interest, depreciation

and operating expenses, exclusive of energy to amount for the year 1916 to approximately $1,002.00, to which must be added the energy cost, including loss and taxes of 1.298¢ per K. W. H."

The Commission further states on page 6:

"The application of the above rate (the rate fixed in the order) to defendant's 1915 operations would yield it a total revenue of $3221.00 for energy furnished complainant, as compared with a total cost for said service of approximately $3100.00, including interest at 8% and a liberal allowance for depreciation."

Nowhere in the opinion does the Commission set forth the information on file with the Commission or give the items of the total cost for the Calistoga service which it says approximates only $3100.00. The Commission has undoubtedly erred in its estimate of the cost of the Calistoga service. We regret that the opinion and order does not set forth the items of that service so that we can demonstrate the error directly. We, however, have compiled figures from the records of the Napa Company which show that the Commission must have proceeded upon an erroneous basis or that it has not taken into account the change of condition which *have* occurred since 1913. In the absence of the specific evidence upon which the Commission acted, we are necessarily forced to resort to the figures and basis upon which the Commission acted in its order of
77 May 21st, 1914, applying thereto the change which has occurred since that time.

Segregation of Operating Expenses in 1914 Order.

In its order of May 21st, 1914, the Commission estimated a reasonable total expense for Napa Valley Electric Company of $7712.35. (See, 4 Ops. & Ords. R. R. C., page 1069). This operating expense was segregated as follows:

To Gas .....$1279.19, or 16.6% of the total;
To Appliances ..... 388.81, or 50% of the total;
To Electric Business ..... 6044.35, or 78.4% of the total;

The total amount segregated to electricity was sub-distributed as follows:

To Calistoga .....377.10, or 6.2% of the whole

Comparison of Business Done in 1913 and 1915.

	1913.	1915.
Total electric business of Napa Valley Electric Company, ...	$20,349	$22,848

This total business was divided as follows:

	1913		1915	
To Calistoga Company	54,100 k.w.h.	$2658.22	161693	$3644.81
To Gas Business		3582.15		2865.00
To Appliance Business	Profits	*591.28		282.11
	Business done	7399.73		4777.52

The following argument is made upon the profit basis.

78 The following shows the business done in 1913 and 1915 segregated upon a percentage basis:

	1913	1915
Gas % of Total business	15—%	1114%
		or a decrease of 25.6%
Calistoga Branch % of total business		.312%
On basis of Consumption an increase of		1.988%
On a revenue basis .13%		.16 %
		or an increase of .271%

Calistoga Company Should be Charged with Peak Load Cost.

The electric energy purchased and carried by the Napa Electric Company for the Calistoga Electric Company is an additional burden upon its orignal unit and constitutes the peak load of the Napa Valley Electric Company. The actual average price charged the Napa Company by the Snow Mountain Company for current is .0101 per k. w. h. The additional of .0001 k. w. is chargeable to the peak load created by furnishing the Calistoga line with electric current. If it were not for the Calistoga line, all current bought by the Napa Company from the Snow Mountain Company would average .01 per k. w. h. Therefore, the extra .0001 is directly chargeable to the Calistoga line and is as follows:

79 .0001 on 835,100 k. w. h. purchased in 1915 .....$83.51

The Corporation Gross Income Tax has been Increased.

The Commission has also overlooked the fact that the rate chargeable to public utilities upon their gross incomes have been raised from 4.6% to 5.25%. Segregating to the Calistoga Company the amount of taxes directly chargeable to it upon the basis of the gross amount paid by it to the Napa Company, (which, as we have seen was $3644.81), at .05¼, we find that the Calistoga Company is properly chargeable with $87.35 for taxes.

Line Loss.

Another element is that of charging to Calistoga Company its share of line loss on the whole system.

In 1915 the Napa Company bought .....835,100 k. w. h.
And sold .....517,440 k. w. h.

Which shows a line loss of .....317,660 k. w. h.

The Calistoga Company purchased of the total amount sold 161,693 k. w. h., or 16% of the total, which equals 50,826 k. w. h. Charging the Calistoga line for this loss at .0101, the amount paid to the Snow Mountain Company, we find that the Calistoga line is chargeable as an element of line loss with $513.33.

Gas Business is Chargeable with Less of Overhead than in 1913.

In 1913, 16.6% of all overhead was chargeable to gas, in 1913 the gas business constituted 15% of the total business of the Napa Company, while in 1915, the gas business constituted only 11.14%
80 of the total business of the Napa Company, or a decrease of 25.7%. Therefore, the percentage 1913 overhead chargeable to gas which was 16.6% was decreased by 25.7%, which gives a percentage of 12.33% of the total overhead, which is properly chargeable to gas in 1915. This difference of 2.27% must be transferred to the whole electric business.

Appliance Business is Chargeable with Less of Overhead than in 1913.

In 1913, the profits from the appliance business was $591.28
In 1915, the profits from the appliance business was only .. 282.11

Or a decrease of 52%.

In 1913, the appliance business was charged in the opinion and order of the Commission with 5% of the total overhead. Decreasing this percentage by .52% (which represents the decrease of business done in 1915), it shows that only 2.4% of the overhead should be chargeable to the appliance business in 1915.

Adding the percentage chargeable to gas and the percentage chargeable to appliance in 1915, as follows:

Gas 12.33%
Plus appliance ..... 2.4 %

We have ..... 14.73% of the total overhead of 1915 chargeable to both gas and appliance.

Subtracting this percentage from the total, it leaves 85.27% which is chargeable to all electric business of 1915.

In 1913, the total overhead fixed by the Commission was $7712.35.

This has remained practically stationary. Taking 85.27% of that overhead, we find that the total overhead chargeable to the
81 electric business in 1915 equals $6460.90.

In 1914, as we have seen, 6.2% of the total electric overhead was distributed to the Calistoga business. Manifestly by reason both of the increase in the amount of electric current used by the Calistoga Company and the additional revenue from that busines, the company must be charged with a greater percentage of the overhead. In 1915 the electric energy delivered to the Calistoga Company measu-ed by k. w. had increased 198.87% and on the reduced rates, the revenue had increased 27.1%. In all fairness it would seem that the overhead chargeable to the Calistoga Company should not be segregated upon the demand basis alone, or upon the revenue basis alone, but should be upon both. Therefore, upon a demand and revenue a basis we find that the Calistoga Company is properly chargeable with an increase of 112.95% or 13.1% of the overhead chargeable to Calistoga in 1915, which equals $849.47.

The investment in the Calistoga line depreciated is $5,900.00. Interest at 8% upon that amount equals $472. Depreciation at 2½% equals $147.

Current furnished during 1915 was 161,693 k. w. h., for which Napa Compan paid .0101 k. w. h. or $1,633.10.

Summary.

The following gives the items which are properly chargeable to the Calistoga Company:

82 Peak Load Charge	$83.51
Gross Revenue Tax	187.35
Percentage of line loss chargeable to Calistoga Company	513.33
Percentage of overhead	849.47
Depreciation on Calistoga line investment	147.00
Cost of Current	1633.10
Percentage on $5,900. at 8%	472.00
Total necessary earnings from Calistoga line	$3,885.76

This sum of $3,885.76 divided by 161,693, the total number of k.w.h. delivered in 1915, equals .0238 per k.w. for all current necessary to reimburse Napa Valley Electric Company for cost of service.

III. The Commission has no Jurisdiction as Between the two Corporations to Fix the Price of Electric Energy in Violation of the Express Contract Existing Between Them.

In urging the validity of the contract between the two corporations, we are not unmindful of the fact that this Commission has expressed itself as being of the opinion that the Commission has full jurisdiction and authority to set aside such contracts and to fix the amount which one corporation may charge another. (See, In the

matter of Murrary and Fletcher, 2 Ops. & Ords. R. R. C., 464; Ukiah v. Snow Mountain, etc. 4 Ops. & Ords., R. R. C., 293; Calistoga Electric Company v. Napa Valley Electric Company, 4 Ops. & Ords. R. R. C., 1061). We believe, however, that the Commission has overlooked the distinction existing between such contracts and contracts fixing rates between public utilities and consumers

83 of electricity It is, of course, well settled that the state has the right to fix the rates which shall be charged by any public utility to the public or any part of the public, that is, any actual consumer of electricity and that no contract is valid as against that power. The exercise of the power of the state to fix rates in violation of contract is upheld upon the ground that the state has a right to regulate the charges which a public utility may make for services performed for the public. The underlying principle of that regulation is public welfare. In the case at bar, there is no pretense that the public have any interest in the dispute between Calistoga Electric Company and the Napa Valley Electric Company. The Calistoga Electric Company is not a consumer of electricity and forms no part of the public. It is in effect merely a distributing agency of the Napa Valley Electric Company and the question involved is simply a question of the division of profits as between those two corporations which division in itself has no effect whatever upon the ultimate charge to be made to the public. The records of this Commission in the above entitled proceedings establish this contention.

It, however, may be well to briefly recite the history of the relations between the Napa Valley Electric Company and the Calistoga Electric Company.

The Napa Valley Electric Company, a corporation, is now, and ever since the year 1909 has been, engaged in the business of buying and selling electric energy to the public generally and to the Calistoga Electric Company; that prior to May, 1911, it proposed to extend and was actually engaged in extending its lines into the Town of Calistoga for the purpose of serving the inhabitants of

84 that town with electric energy. At that time, one William Spiers, was serving the inhabitants of Calistoga with electric energy. He did not desire the Company to enter that field and was negotiating a contract for the purchase of electric energy by him from the Napa Valley Electric Company. During those negotiations, one E. L. Armstrong succeeded to Spiers' interest. At the time the Napa Company so proposed to extend its lines there was no Public Utilities Commission and the company had the legal right to so extend its lines and to become a competitor of Armstrong. In fact under the Constitution of California, as it existed at that time, it was the policy of the state to encourage such competition (Art. XI, Sec. 19, Cal. Const.). The Napa Company was a larger and stronger company than Armstrong and would have been able to sell its electric energy at a lower rate than Armstrong. Armstrong, in order to evade this competition proposed to the Napa Company that he purchase his electric energy at a given rate from the Napa Company for a period of eighteen years at certain rates therein fixed in consideration of the Napa Company refraining from entering the Calis-

toga territory. The Napa Company accepted this offer and thereupon a written contract was entered into between it and Armstrong fixing the rates to be charged by the Napa Company to him. This contract was entered into prior to the establishment of the Public Utilities' Commission. The Calistoga Electric Company subsequently became the successor in interest of Armstrong and continued for sometime to buy its electric energy from the Napa Company at the rate set forth in said contract. Subsequently, however, Calistoga Electric Company petitioned the Railroad Commission to
modify said rates, which said petition the Napa Company
85 resisted on the ground of its contract and other grounds.
The Railroad Commission, however, refused to be bound by the contract and fixed rates other and lower than those therein provided. The rate fixed by the Railroad Commission in this order of May 21st, 1914, however, never became effective and has never been charged or received by the Napa Company as the Calistoga Electric Company again immediately entered into a new contract with the Napa Company, fixing other and different rates than those set forth in the order of the Railroad Commission. This contract was dated September 15th, 1914, a copy of which is attached to the complaint of Calistoga Electric Company and also the answer of Napa Valley Electric Company in Case No. 967, above entitled proceedings.

Under the facts as above set forth, it cannot be disputed that the contract between Armstrong and the Napa Company and contract supplementary thereto between Calistoga Electric Company and the Napa Valley Electric Company were each supported by an adequate and valid consideration. The agreement with Armstrong and the Calistoga Company to buy electric energy from the Napa Company at the rates designated in said contract was not merely a contract fixing rates, but was a contract wherein the Napa Company parted with a valuable right which it can never regain—that is the right to enter the town of Calistoga and serve its inhabitants with electric energy. At the time the Armstrong contract was made, this right existed and by refraining from exercising the right at that time, the Napa Company has lost it, as the Public Utilities' Act has been passed and it now requires the permission of the Railroad Commission before the
Napa Company can enter this field. That permission has
86 been requested of the Commission and has been denied (See
records of Commission in Case No. 508, above entitled proceedings).

The Calistoga Electric Company, by its complaint in Case No. 508, and again by its complaint in Case No. 967, has repudiated both of these contracts and has sought to take from the Napa Company the consideration which it received for the giving up of the most valuable privilege of entering the Town of Calistoga and of serving the inhabitants thereof. The Commission, by its order in both of said cases, has taken away from the Napa Company this consideration. The Commission justifies its acts by asserting that its power to fix rates cannot be limited by any contract entered into between the parties. As we have already pointed out, the power of the state to fix rates in violation of a contract has been upheld upon the

ground that the state has the right to protect the public and *the* regulate the charges which a public utility can make for services performed for the public, or any portion thereof. This power is generally described as the "police power" of the state. It is uniformly held, however, that under this power the state cannot take the property of a public utility without just compensation, nor can it compel the utility to perform services at a less than reasonable compensation and one which will afford a reasonable return upon its investment. The power must be exercised within the bounds of public welfare and cannot invade contractual rights when the public welfare is not involved.

The first thing to determine, therefore, is whether the rights of the public, or any part of the public, are affected by the order of the Railroad Commission made in this case. An inspection
87 of the records in this case shows that the public is not affected either directly or indirectly by the order here made. The petition of the Calistoga Company merely states that the Napa Company is making too much money and that it, the Calistoga Company, cannot make a reasonable return upon its investment at the rate fixed by the contract between itself and the Napa Company. Nowhere does the petition contain an allegation that the public in any way will be benefited by any reduction granted. Neither does the order of the Commission take into consideration the rights of the public nor any consumer of electricity. The order deals with the question entirely as one between the Napa Company and the Calistoga Company and fixes the rate to be charged upon the basis of a reasonable rate to be earned by the Napa Company. The decision and order does not even consider the reasonableness of the rate as affecting the profit of the Calistoga Company. Even granting the power of the Commission to fix rates between the corporations, it must be conceded that the reasonableness of the rate as between the Napa Company and the Calistoga Company must depend upon the earnings and profits of both companies. In other words, it cannot be asserted that a rate allowing the Napa Company to earn but eight per cent upon its investment would be reasonable when the Calistoga Company was earning twenty-five per cent by distributing the same commodity. If the Commission were to establish a reasonable rate as between the Napa Company and the Calistoga Company, it must ascertain what both companies are earning and divided the profit between them upon some sort of a reasonable basis, such as allowing each to earn the same percentage upon its investment. The records of the Commission show that no investigation of the business of the Calistoga Company and no appraisement of its property has ever been made by the
88 Commission. Whatever information this Commission may have concerning the property and business of the Calistoga Company depends entirely upon the ex parte statements made to it by the Calistoga Company through its annual reports.

Furthermore, the records of the Commission show that it has never fixed the rates to be charged by the Calistoga Company to its consumers and nothing appears from the records of the Commission to

show that it has any present intention of investigating and fixing such rates. Thus we see that the Commission can make no order in this matter based upon a reasonable division of profits as between the Napa Company and the Calistoga Company until it has made the same investigation of the Calistoga Company as it has made of the Napa Company, and determines the amount which the Calistoga Company shall be allowed to earn.

The foregoing is based upon the assumption that the Commission has treated the question as one existing between the Napa Company and the Calistoga Company. That this must be the basis upon which the Commission has proceeded cannot be questioned for a moment because as we have already stated, the Commission has never fixed the rates to be charged the public by the Calistoga Company and in the very order complained of not a word is said about the disposition to be made of the saving effected by the order of the Calistoga Company. In other words, the difference between the contract rate and the rate fixed by the Commission is not to be passed on to the public and no disposition is made of it whatever. This saving, therefore, under the order of the Commission is to remain in the coffers of the Calistoga Electric Company.

We, therefore, reach the irresistible conclusion that the order of the Commission merely goes to a division of profits as be-
89 tween the Napa Company and the Calistoga Company. No other person is to be affected and neither the public nor any portion thereof is to profit.

We, therefore, come to the question which must be answered and which cannot be evaded, to-wit: Has the Railroad Commission any jurisdiction over such division of profits? We think not. No court of record seems to have passed upon this precise question. That the power of the Commission must be exercised under the police power of the state is well settled, however, and it cannot be questioned but that any exercise of power by the Commissoin which goes beyond the point of protecting the public is invalid.

"If a state legislature attempted to abrogate a contract between two carries or between a carrier and one of its patrons simply in order to relieve one of the parties to that contract from a burdensome obligation, such a statute might well be declared unconstitutional, but if the invalidity of contracts was simply a necessary incident to the enforcement of a regulation enacted for public ends, it seems that such a statute should be sustained."

Reeder on "Validity of Rate Regulation," Sec. 198.

It would seem from a study of the cases that the statement of the author is a correct one. That is, that the test of the power to regulate rates is the benefit to the public. Applying that test to this case, we see that the public is not affected in any way by the order of the Commission and for that reason the order is invalid.

It may be contended, however, that the Commission has authority to fix the charges of the Napa Valley Electric Company merely because it is a "public utility" and that upon this ground the basis of

charges may be fixed irrespective of the persons to whom the commodity is furnished. This is a mere begging of the question for the class of persons to whom the commodity is furnished determines the status of the company as a public utility. As we have
90 already seen, control over public utilities and power to fix their rates is held justifiable solely on the ground that the welfare of the public is affected. It must be conceded that the Napa Valley Electric Company could not be deemed a public utility and its rates subject to the control of the Commission if it sold its commodity exclusively to the Calistoga Electric Company and to no other person. In that case a contract between it and the Calistoga Company would be valid and binding as between the two companies. The Commission would, of course, have jurisdiction over the rate charged by the Calistoga Company to the public and would have to fix those rates upon the basis of a reasonable charge estimated by the ordinary and usual cost of production of electric energy in the neighborhood served by the Calistoga Company. This charge would be fixed irrespective of the contract rate between the Calistoga Company and the Napa Company. In this way and this way alone, would the Commission control the price paid by Calistoga Company for its electric energy. This is the only ground upon which the Commission today controls the cost of production of any company generating electricity. The Commission does not assume the power and has not the power to tell a producing company what it shall pay for its transformers, its wire, its poles, or any other part of its plant or transmission system or even say what it shall pay its officers and employees. The only control over these things which the Commission has is exercised indirectly by fixing the rates which such a company may charge to its consumers, or which the company may charge to the public, or any part of the public, for the commodity produced by the Company. In the event of there being sev-
91 eral intermediary companies between the original producer of electric energy and the public, the Commission has no concern over the division of profits between those companies and its only control over the cost of production or the division of profits between those companies is its power to fix the ultimate rate which may be charged to the ultimate consumer.

We have diligently read the several opinions of the Commission dealing with the question of its power over contracts, but have failed to discover that the Commission has considered the question in the light here presented. In view of this and the fact that the Commission has erred in its computation of earnings upon the Calistoga portion of the business as set forth in the first two grounds herein urged for granting a rehearing, we respectfully request that a rehearing herein may be granted for the purpose of considering these questions.

Dated December 20th, 1916.

Respectfully submitted,

U'REN AND BEARD,
Attorneys for Napa Valley Electric Company.

92 "EXHIBIT A."

Case No. 967.

Dec. 11, 1916.

Attention Mr. F. W. Mielenz, Manager.

Napa Valley Electric Co., St. Helena, California.

GENTLEMEN:

In reply to your letter under date of December 6, 1916, relative to this Commission's Decision No. 3876, we desire to advise that, in arriving at the rate to be charged by Napa Valley Electric Company for electric service supplied by it to Calistoga Electric Compnay, the Commission gave due consideration to all of the evidence, and to all pertinent matters which could properly be considered by it in arriving at its decision.

In this connection we would suggest that the question at issue at this time is not the particular process by which the Commission arrived at its decision, but whether or not the final determination was just and reasonable.

Owing to the large amount of work devolving upon the Commission, it is not possible, even assuming that under certain conditions it might be considered advisable to explain its decision after these decisions are rendered, *and to* into all the innumerable details which might be necessary to satisfy the parties to any action before the Commission, that the manner of arriving at the final results, the process used and the mental attitude of the Commission were entirely proper and justified.

For your information, we will state that the figures for investment were those shown in the Commission's decision in Case No. 538, modified to include additions and betterments since that time, and to conform to any changes in operating or service conditions.

You undoubtedly have before you all necessary basic information which will enable you to determine whether or not the rate fixed by the Commission in said Decision No. 3876 is just and reasonable, and supported by the evidence introduced at the hearing, and we would suggest that it is not necessary for you to follow the identical methods used by the Commission when there can be only one question, and that question relates specifically to the final result of the rate fixed rather than the method by which the rate was determined.

93 Regretting that we are unable to go into full detail regarding this matter at this time, we are

Yours very truly,

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,

By ——— ———,
Secretary.

F. E. H./C. K.

8—401

Endorsed: Filed Apr. 19, 1918. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

94 In the Southern Division of the United States District Court, Northern District of California, Second Division.

In Equity. No. 396.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, ALEX. GORDON, H. D. LOVELAND, EDWIN O. EDGERTON, and FRANK R. DEVLIN, as Members of and Constituting the Railroad Commission of the State of California, Defendants.

Motion to Dismiss Bill of Complaint.

To the Honorable the Judges of the District Court of the United States, Northern District of California, Southern Division:

Now come the defendants and move to dismiss the bill of complaint herein upon the ground that it affirmatively appears from the allegations thereof that the subject matter thereof is res adjudicata, and further, upon the ground that no cause of action is stated entitling the plaintiff to the relief prayed, or any relief whatever.

This motion is based upon the bill of complaint, the notice of motion, all other pleadings and papers in this proceeding, and
95 upon the provisions of the Public Utilities Act of the State of California, Statutes 1915, page 115.

Wherefore, the defendants pray this Honorable Court that it hear this motion and that it render its decree dismissing the bill of complaint, and that it send the defendants hence with their costs and disbursements.

Dated at San Francisco, California, this 8 day of May, 1918.

DOUGLAS BROOKMAN,
Solicitor for Defendants.

Endorsed: Filed May 9, 1918. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

96 At a Stated Term, to wit, the March Term, A. D. 1919, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the Court Room, in the City and County of San Francisco, on Monday, the 31st day of March, in the Year of Our Lord One Thousand Nine Hundred and Nineteen.

Present: The Honorable William C. Van Fleet, District Judge.

No. 396. Equity.

NAPA VALLEY ELECTRIC CO.

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al.

(Order Granting Defendants' Motion to Dismiss Bill of Complaint.)

Defendants' motion to dismiss the bill of complaint, heretofore heard and submitted, being now fully considered and the Court having filed its opinion, it is ordered that said motion be granted and that the bill of complaint be and the same is hereby dismissed.

97 In the Southern Division of the United States District Court for the Northern District of California, Second Division.

Equity. # 396.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Plaintiff,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al., Defendants.

(Opinion.)

Filed March 31st, 1919.

U'Ren & Beard, of San Francisco, for Plaintiff.
Douglas Brookman, of San Francisco, for Defendants.

VAN FLEET, *District Judge:*

The plaintiff, a public service corporation furnishing electric energy for power and other purposes, seeks to enjoin the enforcement of certain orders of the defendant Commission regulating rates to be charged for its service as being in violation of its rights under the contract clause of the Constitution of the United States and the XIV Amendment thereto.

Defendants have moved to dismiss the bill on the ground,
98 among others, that it appears from its averments that the controversy stated is res judicata; and I am of the opinion that the motion must prevail.

It appears from the bill that after the rendition of the orders in question plaintiff filed with the defendant Board a petition for a rehearing of the controversy, which petition was upon consideration denied; and it is alleged: "That thereafter and on the 20th day of June, 1917, your orator duly filed in the Supreme Court of the State of California, its Petition for a Writ of Review, asking and praying that a Writ of Review issue out of said Court commanding said Rail-

road Commission to certify to said Court, on a day named in said Writ, a full and complete record of all the proceedings leading up to the making of said Order and Decision dated May 21, 1914, together with said Order and Decision and your orator's Application for a Rehearing thereof; and also a full and complete record of all the proceedings leading up to the making of said Order and Decision dated November 15, 1916, together with said Order and Decision and orator's Application for a rehearing thereof, and that upon the return of said Writ, said Order and Decisions of the said Railroad Commission be reversed and vacated and annulled upon the ground that said Orders and Decisions violate the rights of your orator under the Constitution of the United States, and more particularly its rights under Section 10 of Article I thereof, and under Section 1 of Article XIV of the Amendments thereto; that the said Supreme Court of the State of California denied your orator's said Petition for a Writ of Review and refused to issue a Writ of Review, as prayed for in said Petition."

This application was made within the time prescribed by and in pursuance of Sec. 67 of the Public Utilities Act (Stats. Cal. Extra Session, pp. 15, 55) which gives the right to a party deeming
99 himself aggrieved to apply to the Supreme Court of the State within 30 days after the decision by the Commission on a petition for rehearing to have "the lawfulness of the original order or decision on rehearing inquired into and determined"; that such review "shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California"; and that upon the hearing "the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the Commission". As the terms of the statute clearly import, the review there contemplated is strictly a judicial one, before the court sitting in its capacity as a judicial tribunal, limited to a consideration of the purely legal aspects and propriety of the act of the Commission under review, and not as in Prentis vs. Atlantic Coast Line Co., 211 U. S. 210, as a part of the rate fixing power of the State. (Detroit and Mackinac R. Co. vs Michigan Railroad Commission, 235 U. S. 402; Palermo Land & Water Co. vs. Railroad Commission of California, et al. 227 Fed. 708.) Under this statute, when plaintiff's petition for rehearing was denied the legislative history of the orders complained of was complete, the final step to make them effective having been taken. The question of their validity then became a justiciable one and plaintiff could at once proceed to test that question in the courts. (Palermo Land & Water Co. vs. Railroad Commission, supra.)

For that purpose plaintiff was at liberty to proceed either in
100 the State court, as it did, or in this court, since the State statute, even if so intended, could not restrict or abridge its right to invoke the jurisdiction of the latter court in any case falling within its jurisdiction. It chose to present its case to the State court and, as we have seen, upon the same questions of right as those presented here. That court was in all respects as competent

and as much under obligation to protect those rights, constitutional or otherwise, as this court, and it will of course be presumed that it kept that obligation in view in passing upon plaintiff's application. In this state of the case I am unable to perceive how the objection that the action of the State court is conclusive of the controversy and that plaintiff is now precluded from bringing the same grievance here, may be avoided. It has had its day in court. (Detroit and Mackinac R. Co. vs. Michigan Railroad Commission, supra.) While it might have sought a review of the decision of the State court at the hands of the Supreme Court of the United States by appropriate proceedings under Sec. 237 of the Judicial Code, (Williams vs. Bruffy, 102 U. S. 248, 255), it did not see fit to do so and it cannot now be heard to litigate the controversy anew in this court. The ruling in the Michigan case would seem to be conclusive on this point. And on the question of the functions of the State court, the present case would appear to fall more clearly within the rule there announced than the case there presented, by reason of the less explicit language of the Michigan statute leaving the question seriously open to construction. Here the explicit limitations found in the California act as to the purpose and extent of the review by the State court leave no possible room for construction.

101 The contention by plaintiff that the ruling of the State court is not a proper predicate for invoking the doctrine of res judicata in that it is not a judgment "on the merits" but purely a negative determination or refusal to assume jurisdiction, is unsound. We are bound to assume, if we accept the averments of the bill, that the petition put that court in full and complete possession of all the facts upon which it relies here: (Detroit and Mackinac R. Co. vs. Michigan Railroad Commission); and that being true the denial of the petition was necessarily a final judicial determination (Williams vs. Bruffy, supra) based on the identical rights asserted in this court; and it was between the same parties. Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact. (Calaf vs. Calaf, 232 U. S. 371; The Hart Steel Co. et al. vs. Railroad Supply Co., 244 U. S. 294, 299.) Nor is it material that the reasons for the conclusion reached by the court are not given. We are not concerned with the reasoning, but only with the judgment, and it must be assumed in support of the latter that upon the facts presented to it the State court upon due consideration reached the conclusion that plaintiff's rights had not been violated. (The Hart Steel Co. et. al. vs. Railroad Supply Co.; Williams vs. Bruffy, supra.

Lastly, it is an unwarranted assumption that the doctrine invoked is one of a highly technical character, to be reluctantly enforced. As stated in the Hart Steel case: "This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substan-

102 tial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound

by it in every way, wherever the judgment is entitled to respect, Kessler vs. Eldred, supra."

It results that the bill must be dismissed, and it is so ordered.

Endorsed: Filed Mch. 31, 1919. Walter B. Maling, Clerk.

103 In the District Court of the United States, Northern District of California, Second Division.

No. 396. Equity.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, Alex Gordon, H. D. Loveland, Edwin O. Edgerton and Frank R. Devlin, as Members of and Constituting the Railroad Commission of the State of California, Defendants.

Decree Dismissing Suit on Defendants' Motion to Dismiss.

This cause came on regularly to be heard at the July term, Nineteen Hundred and Eighteen, of this Court and was argued by counsel and thereupon submitted to this Court for its decision and thereafter, upon consideration thereof, on the 31st day of March, 1919, the Honorable William C. Van Fleet, District Judge, announced his decision and caused a minute entry to be made as follows:

"Defendants' Motion to Dismiss the Bill of Complaint, heretofore heard and submitted, being now fully considered and the Court having filed its opinion, it is ordered that said motion be granted and that the bill of complaint be and the same is hereby dismissed."

It is, therefore, ordered, adjudged and decreed as follows, viz:

That Defendants' Motion to Dismiss be sustained, and that this cause be and hereby is dismissed, and that defendants recover from plaintiff their costs herein expended.

Dated at San Francisco, April 8th, 1919.

WM. C. VAN FLEET,
District Judge.

104 O. K. as to form.

MILTON T. U'REN,
U'REN & BEARD,
Solicitors for Complainant.

Endorsed: Filed and entered April 8, 1919. Walter B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk.

105 In the District Court of the United States, Northern District of California, Second Division.

No. 396. Equity.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, Alex. Gordon, H. D. Loveland, Edwin O. Edgerton and Frank R. Devlin, as Members of and Constituting the Railroad Commission of the State of California.

Petition for Appeal.

To the Honorable William C. Van Fleet, District Judge:

The above named complainant, Napa Valley Electric Company, a corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 8th day of April, 1919, does hereby appeal under and by virtue of Section 238 of the Judicial Code of the United States, from said decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith and prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Dated at San Francisco, California, April 11th, 1919.

MILTON T. U'REN,
U'REN & BEARD,
Solicitors for Complainant.

106 Endorsed: Filed Apr. 12, 1919. W. B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk.

107 In the District Court of the United States, Northern District of California, Second Division.

No. 396. Equity.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, Alex. Gordon, H. D. Loveland, Edwin O. Edgerton and Frank R. Devlin, as Members of and Constituting the Railroad Commission of the State of California, Defendants.

Assignment of Errors.

Now comes the complainant in the above entitled cause and files the following Assignment of Errors upon which complainant will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 8th day of April, 1919.

I.

That the United States District Court, for the Northern District of California, Second Division, erred in making and entering its decree granting defendants' motion to dismiss complainant's bill of complaint and in dismissing complainant's bill of complaint, in this, to wit:

1. That said Honorable District Court erred in upholding the Orders and Decisions of the Railroad Commission of the State of California, dated the 21st day of May, 1914, and the 15th day of November, 1916, complained of in complainant's Bill of Compiaint on file herein, for the reason that said Orders and Decisions were erroneous and unlawful, in that said Orders and Decisions violate the rights of said complain-t under the constitution of the United
108 States and more particularly its rights under Sections 10 of Article I thereof and under Section 1 of Article XIV of the amendments thereto;

2. That the said Honorable District Court erred in denying complainant the relief prayed for in its said Bill of Complaint on file in the above entitled action for the reason that the Order and Decision of defendants above named dated the 21st day of May, 1914, as set forth in said Bill of Complaint was erroneous and unlawful, in that said Order and Decision violates the rights of said complainant under the Constitution of the United States and more particularly its rights under Section 10 of Article I thereof and under Section 1 of Article XIV of the amendments thereto;

3. That the said Honorable District Court erred in denying complainant the relief prayed for in said Bill of Complaint for the reason that the said Order and Decision of defendants, dated the 15th day of November, 1916, as set forth in said Bill of Complaint, was erroneous and unlawful in that it violates the rights of said complainant under the Constitution of the United States and more particularly its rights under Section 10 of Article I thereof and under Section 1 of Article XIV of the amendments thereto;

4. That said Honorable District Court erred in denying complainant the relief prayed for in said Bill of Complaint for the reason that said Orders and Decisions and each of them were and are irregular and unlawful in that they impair the obligations of the contracts existing between this complainant and the said Calistoga Electric Company, a corporation, and also constitute a taking of this complainant's property without due process of law;

5. That the said Honorable District Court erred in adjudging that the refusal of the Supreme Court of California to issue a
109 preliminary Writ of Review and to review the said orders and Opinions of defendants complained of, was "res judicata" of the controversy, for the reason that said refusal of the Supreme Court of the State of California deprived complainant of its property without due process of law and in violation of the Constitution of the United States and particularly Article 5 of the Articles of Amendments thereto;

6. That said Honorable District Court erred in adjudging and holding that the proceedings had, or attempted to be had, in the Supreme Court of the State of California *was* "res judicata" of this controversy, or *was* a bar to complainant's rights to proceed in this action;

7. That said Honorable District Court erred in deciding that the refusal of the Supreme Court of the State of California to issue a preliminary Writ of Review and to review the said Orders and Decisions of the Railroad Commission of the State of California was "res judicata" of the controversy and was a bar to complainant's rights to proceed in this proceeding, for the reason that said decision of this Court deprives this complainant of its property without due process of law contrary to the provisions of the Constitution of the United States and particularly of Article 5 of the Articles of Amendment thereto;

8. That said Honorable District Court erred in this:

That by its decree said Court deprived and took from complainant a right, privilege and immunity especially set up and claimed by it under the Constitution of the United States and especially under Section 10 of Article I thereof and also the further right, privilege and immunity especially set up and claimed by it under the Constitution of the United States and especially under
110 Section 1 of Article XIV of the amendments thereto, and also

the further right, privilege and immunity especially set up and claimed by it under the Constitution of the United States and especially under Article V of the Articles of amendment thereto.

Wherefore, the appellant prays that said decree be reversed and that said District Court for the Northern District of California, Second Division, be ordered to enter a decree reversing its decision in said cause.

MILTON T. U'REN,
U'REN & BEARD,
Solicitors for Appellant.

Endorsed: Filed Apr. 12, 1919. W. B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk.

111 In the District Court of the United States, Northern District of California, Second Division.

No. 396. Equity.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, ALEX. GORDON, H. D. LOVELAND, EDWIN O. EDGERTON and FRANK R. DEVLIN, as Members of and Constituting the Railroad Commission of the State of California, Defendants.

Order Allowing Appeal.

Upon motion of Milton T. U'Ren, Esq., one of the solicitors and counsel for complainant, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings had herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed in the sum of Three hundred ($300) Dollars.

Dated this 12th day of April, 1919.

WM. C. VAN FLEET,
District Judge.

Endorsed: Filed Apr. 12, 1919. W. B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk.

112 Fidelity and Deposit Company of Maryland.

Home Office, Baltimore, Md.

Pacific Coast Dept. Office, San Francisco, Cal.

In the United States District Court of the Northern District of California, Second Division.

Equity. No. 396.

NAPA VALLEY ELECTRIC CO., a Corporation, Plaintiff,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THEILAN, ALEX. GORDON, H. D. LOVELAND, EDWIN O. EDGETON and FRANK R. DEVLIN, as Members of and Constituting the Railroad Commission of the State of California, Defendants.

Bond on Appeal.

Know all men by these presents, that Fidelity and Deposit Company of Maryland, a body corporate, duly incorporated under the laws of the State of Maryland, and authorized to act as surety under the act of Congress approved August 13, 1894, whose principal office is located in Baltimore, State of Maryland, is held and firmly bound unto the Railroad Commission of the State of California, and Max Theilan, Alex. Gordon, H. D. Loveland, Edwin O. Edgeton and F. R. Devine, as members of and constituting the Railroad Commission of the State of California (defendants in the above-entitled case) in the sum of three hundred and 00/100 ($300.00) Dollars to be paid unto the Railroad Commission of the State of California, and Max Theilan, Alex. Gordon, H. D. Loveland, Edwin O. Edgeton and F. R. Devine, as members of and constituting the Railroad Commission of the State of California, for which payment well and truly to be made,
113 the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

Signed, sealed and dated this 18th day of April, A. D. 1919.

The condition of the above obligation is such that whereas the said Napa Valley Electric Co., a corporation, (plaintiff in the above-entitled suit) has taken an appeal to the Supreme Court of the United States, to reverse an order made, rendered and entered by the United States District Court for the Northern District of California, Second Division, in the above entitled case on the 8th day of April, A. D. 1919, denying Plaintiff's application for an injunction and costs of suit.

Now, therefore, the condition of the above obligation is such that if the said Napa Valley Electric Co. shall prosecute its said appeal to the effect and answer all costs which may be adjudged if it fails

to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

And it is further hereby expressly agreed that in case of a breach of any condition of the above obligation and this Bond, the said United States District Court for the Northern District of California, Second Division, may, upon Notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the above entitled case therein pending to ascertain the amount which said Fidelity and Deposit Company of Maryland is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

[Corporate Seal.]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
By EDWIN C. PORTER,
Attorney in Fact.

Attest:
PAUL M. NIPPERT, *Agent.*

The premium charged for this bond is Ten Dollars per annum.

Approved this 18th day of April, 1919.
WM. C. VAN FLEET,
U. S. District Judge.

114 Endorsed: Filed Apr. 19, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

115 In the District Court of the United States, Northern District of California, Second Division.

No. 396. Equity.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA AND MAX Thelen, Alex. Gordon, H. D. Loveland, Edwin O. Edgerton, and Frank R. Devlin, as Members of and Constituting the Railroad Commission of the State of California, Defendants.

Præcipe for the Record.

To W. B. Maling, Esq., Clerk.

SIR:

Please prepare a transcript of the record in the case of "Napa Valley Electric Company, a corporation, Complainant, vs. Railroad Commission of the State of California and Max Thelen, Alex. Gor-

don, H. D. Loveland, Edwin O. Edgerton and Frank R. Devlin, as members of and constituting the Railroad Commission of the State of California, Defendants," and include therein the following papers:

Bill of Complaint.
Defendants' Motion to Dismiss Bill of Complaint.
Order of Court Dismissing Plaintiff's Bill of Complaint.
Decree Dismissing Suit on Defendants' Motion to dismiss.
Petition for Appeal.
Assignment of Errors.
Order allowing Appeal and fixing Appeal Bond.
Appeal Bond.
116 Citation on Appeal.

Respectfully,

MILTON T. U'REN,
U'REN & BEARD,
Solicitors for Complainant.

Endorsed: Filed Apr. 19, 1919. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

117 In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 396. Equity.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al., Defendants.

Clerk's Certificate to Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred sixteen (116) pages, numbered from 1 to 116, inclusive, to be full, true, and correct copies of the record and proceedings as enumerated in the præcipe for transcript of record, as the same remain on file and of record in the above-entitled cause, that the same constitute the record on appeal to the Supreme Court of the United States.

I further certify that the cost of the foregoing transcript of record is $50.25; that said amount was paid by complainant; and that the original citation issued herein is hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of May, A. D. 1919.

[Seal of the U. S. District Court, Northern District of California.]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

118 In the District Court of the United States, Northern District of California, Second Division.

Original.

No. 396. Equity.

NAPA VALLEY ELECTRIC COMPANY, a Corporation, Complainant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, Alex. Gordon, H. D. Loveland, Edwin O. Edgerton, and Frank R. Devlin, as Members of and Constituting the Railroad Commission of the State of California.

Citation on Appeal.

THE UNITED STATES OF AMERICA, *ss:*

To the Railroad Commission of the State of California and Max Thelen, Alex. Gordon, H. D. Loveland, Edwin O. Edgerton, and Frank R. Devlin, as members of and constituting the Railroad Commission of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, in the District of Columbia, on the 10th day of June, A. D. 1919, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States, for the Northern District of California, Second Division, from a final decree signed, filed and entered on the 8th day of April, 1919, in that certain suit being in equity No. 396, wherein Napa Valley
119 Electric Company, a corporation, is plaintiff and you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said order allowing appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

Witness the hand of Hon. William C. Van Fleet, United States District Judge for the Northern District of California, Second Division, this 12th day of April, A. D., 1919.

WM. C. VAN FLEET,
United States District Judge for the Northern District of California, Second Division.

120 Due service of within Citation on Appeal by copy, admitted this 25th day of April, 1919.

W. R. WILLIAMS,
Secretary State Railroad Commission.
DOUGLAS BROOKMAN,
Attorney for Defendants.

[Endorsed:] No. 396, Equity. In the District Court of the United States, Northern District of California, Second Division. Napa Valley Electric Company, a corporation, Complainant, vs. Railroad Commission of the State of California, et al., Defendants. Original. Citation on Appeal. Filed Apr. 28, 1919, W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk. U'Ren & Beard, Attorneys for Complainant, Hobart Building, 582 Market Street, San Francisco.

Endorsed on cover: File No. 27156. N. California D. C. U. S. Term No. 401. Napa Valley Electric Company, appellant, vs. The Railroad Commission of the State of California and Max Thelen, Alex. Gordon, H. D. Loveland, et al., as members, &c. Filed June 4, 1919. File No. 27156.

October Term, 1918.

FIL
OCT 2
JAMES D.

IN THE

Supreme Court of the United States

NAPA VALLEY ELECTRIC COMPANY, a corporation,

Appellant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, ALEX. GORDON, H. D. LOVELAND, EDWIN O. EDGERTON and FRANK R. DEVLIN, as members of and constituting the Railroad Commission of the State of California,

Respondents.

No. 1

MOTION TO ADVANCE CAUSE.

MILTON T. U'REN,
Attorney for Appellant.

DOUGLAS BROOKMAN,
Attorney for Respondents.

THE RECORDER COMPANY, 560 STEVENSON ST., S. F.

October Term, 1918.

IN THE

Supreme Court of the United States

NAPA VALLEY ELECTRIC COMPANY, a corporation, *Appellant,* vs. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and MAX THELEN, ALEX. GORDON, H. D. LOVELAND, EDWIN O. EDGERTON and FRANK R. DEVLIN, as members of and constituting the Railroad Commission of the State of California, *Respondents.*	No. 1070

MOTION TO ADVANCE CAUSE.

Both parties herein join in moving this Honorable Court to advance this cause for hearing as near the beginning of the October Term of 1919 as may be convenient. In support of this motion we set forth briefly the facts of this case, the general public interest therein and the importance of an early decision.

FACTS.

Calistoga Electric Company, a public utility, is engaged in supply electric energy in and about Calistoga, Napa County, California. The electric energy so sup-

plied is purchased by Calistoga Electric Company from Napa Valley Electric Company, also a public utility, under a contract entered into some years prior to the adoption of constitutional provisions extending the regulatory powers of the Railroad Commission of California to include public utilities as well as railroads. This contract specified the wholesale price for the electric energy to be furnished Calistoga Electric Company by Napa Valley Electric Company.

A proceeding was brought before the Railroad Commission of California by Calistoga Electric Company drawing into question the reasonableness of the rates charged for the electric energy supplied by Napa Valley Electric Company to Calistoga Electric Company. After notice and hearing the Railroad Commission made its order prescribing a schedule of rates which it found to be reasonable to be charged for electric energy to be supplied Calistoga Electric Company by Napa Valley Electric Company. This schedule altered and reduced the rate specified in the contract under which electric energy was supplied to Calistoga Electric Company by Napa Valley Electric Company. Thereafter Napa Valley Electric Company, in accordance with the provisions of Section 67 of the Public Utilities Act of California (Cal. Stats., Ex. Session, 1911, pp. 18, 55), applied to the Supreme Court of California for a writ of *certiorari* to review the order of the Railroad Commission setting aside said contract. This section provides:

> "Sec. 67. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after

the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. *Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the supreme court, unless for a good reason shown the same be continued.* No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified to by it. *The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California.* The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. *The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission.* The provisions of the code of civil procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified)

> shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases."

In its application Napa Valley Electric Company claimed that the order of the Railroad Commission was unlawful on the ground that such an order was an impairment of the contract existing between it and the Calistoga Electric Company; furthermore, that the sale of electric energy by it to the Calistoga Electric Company was not a public service in that such sale was a wholesale service and that the public had no interest in the rates to be charged between the two companies and therefore the sale from the Napa Valley Electric Company to the Calistoga Electric Company was not a public utility service subject to regulation.

The Supreme Court of the State of California denied the application of Napa Valley Electric Company for a writ of certiorari without even issuing a preliminary writ or fixing a return day and without a hearing.

Thereafter Napa Valley Electric Company filed in the District Court of the United States, Northern District of California, Second Division, a Bill of Complaint seeking an injunction restraining the Railroad Commission of California from enforcing its order changing the contract and decreasing the rate to be paid for electric energy supplied to Calistoga

Electric Company. The Railroad Commission filed a motion to dismiss the Bill of Complaint on the ground:

(a) That the matter was *res judicata,* having already been determined by the Supreme Court in its action refusing to grant a writ of certiorari upon application of the Napa Valley Electric Company as above mentioned; and

(b) That in any event the sale of electric energy by Napa Valley Electric Company to Calistoga Electric Company was a public utility service and was subject to regulation by the state and that in the exercise of such regulation the Railroad Commission might fix the rate to be paid for such service irrespective of any contract which might exist between the corporations.

On April 8, 1919, Hon. William C. Van Fleet, District Judge, rendered his decision sustaining the motion of the Railroad Commission to dismiss the Bill of Complaint and the appropriate decree was thereupon entered in said proceedings. Upon this decree Napa Valley Electric Company presents appeal to this Honorable Court.

QUESTIONS.

The questions presented herein are:

1. In a proceeding brought before a Federal District Court seeking an injunction restraining the Railroad Commission of California from enforcing its order altering and decreasing rates fixed by con-

tracts between public utilities, is the refusal of the State Supreme Court to issue a preliminary writ of review available as a plea of *res judicata?*

2. Is the service by one corporation in supplying electric energy wholesale to another corporation a public service such as is subject to regulation by the state and is the contract rate for such service subject to revision by the Railroad Commission?

GENERAL PUBLIC INTEREST IN THIS CASE.

The Railroad Commission of California has extensive jurisdiction under the Public Utilities Act above named to supervise and regulate the rates, service and finances of public utilities. The Act provides a procedure whereby an aggrieved party may seek from the State Supreme Court a review of the order of the Railroad Commission claimed to be in violation of the state or federal constitution. Whether the action of the State Supreme Court in refusing to issue a preliminary writ of certiorari or to have a hearing upon a petition for writ of certiorari is such an action as constitutes a bar preventing an aggrieved party from seeking relief from the federal courts is a matter of great importance, both to the public utilities of the state and to the state itself. Until this question is determined no public utility nor anyone interested therein can be certain of the judicial channels available for the adjudication of the lawfulness of the orders of the Railroad Commission. Confusion must necessarily result until this question is settled.

Furthermore, there are throughout the state many instances where water, gas or electric energy is supplied wholesale to companies which in turn distribute these services to the consuming public. The power of the state to regulate these wholesale services and the jurisdiction of the Railroad Commission to alter the contract rates therefore must remain in doubt until this proceeding is determined.

The interest in and importance of these questions extend, not only to the state government vested with control of public utilities, the public utilities themselves, but to all the consumers and others interested in public utility matters. In addition, the questions are not local to the State of California. Practically every other state has a railroad or public service commission operating along substantially the same lines and confronted largely with the same problems as exist in the State of California. The questions herein presented, therefore, assume a national interest.

For these reasons, we respectfully enjoin in asking that the cause be advanced for hearing.

Respectfully submitted,

MILTON T. U'REN,
Attorney for Appellants.

DOUGLAS BROOKMAN,
Attorney for Respondent.

DEC 2 1919
JAMES D. MAHER,
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No. 401

NAPA VALLEY ELECTRIC COMPANY,
Appellant,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, and MAX THELIN, ALEX GORDON, H. D. LOVELAND, EDWIN O. EDGERTON, and FRANK R. DEVLIN, as Members of and constituting the Railroad Commission of the State of California,
Respondents.

APPELLANT'S OPENING BRIEF.

MILTON T. U'REN,
Solicitor for Appellant.

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In the Supreme Court
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NAPA VALLEY ELECTRIC COMPANY,

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THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, and MAX THELIN, ALEX GORDON, H. D. LOVELAND, EDWIN O. EDGERTON, and FRANK R. DEVLIN, as Members of and constituting the Railroad Commission of the State of California,

Respondents.

APPELLANT'S OPENING BRIEF.

This is an appeal from a decree of the District Court of the United States for the Northern District of California dismissing appellant's bill in equity.

Statement of the Case.

This bill in equity was filed by appellant for the purpose of enjoining the Railroad Commission of the State of California from enforcing certain orders of said Commission regulating the rates to be charged by appellant to Calistoga Electric Company and its successor in interest, the California Light & Telephone Company, upon the ground that said orders of the Commission were in violation of appellant's rights under the contract clause of the Constitution of the United States and the fourteenth amendment thereto.

The Railroad Commission appeared in the action through its attorney and moved to dismiss appellant's bill of complaint upon the following grounds, (1) that it affirmatively appears from the allegations of the bill that the subject matter thereof is *res judicata*, and (2) that no cause of action is stated entitling the plaintiff to the relief prayed, or any relief whatever. (Record, p. 58 ff. 94 and 95)

The motion to dismiss was duly and regularly heard by the District Court and said court thereafter made its order granting said motion and entered its decree dismissing the suit. (Record p. 62, Tr. ff. 103)

The learned District Judge, upon granting said motion and entering said decree filed his opinion setting forth the grounds upon which said order and decree were based. (Record pp. 59-62, ff. 97-102)

Specifications of Error.

In the record is contained "Assignment of Errors" relied upon by appellant. (Record pp. 64-66, ff. 107-110)

While the Assignment of Errors contains eight separate paragraphs, yet it will be seen that these may be considered under two general headings, to wit:

1. That the District Court erred in not setting aside the orders and decisions of the Railroad Commission complained of, upon the ground that they violated appellant's rights under the Constitution of the United States and particularly its rights under Section X of Article I thereof and under Section I of the fourteenth amendment thereto; and

2. That the District Court erred in holding that the controversy was *res judicata.*

Argument.

Part I.

A. The controversy is not res judicata.

From the opinion of the District Court it appears that the sole ground upon which the court below dismissed appellant's bill was that the controversy was *res judicata.* While the court below entered its judgment solely upon that issue, yet we shall assume that this court, having acquired jurisdiction of the case, will dispose of all of the questions involved in the appeal (Horner v. U. S.,

143 U. S. 570; Montgomery's Manual of Federal Procedure, Sec. 1558), and we shall accordingly discuss them.

We take it, however, that in view of the fact that the decision of the court below rested solely upon the question of res judicata that an orderly consideration of the appeal requires a discussion of that question first.

It appears from the opinion of the learned District Judge that the determination that the controversy was *res judicata* rested upon the following allegation contained in the bill then before the District Court:

"XVIII.

"That thereafter and on the 20th day of June, 1917, your orator duly filed in the Supreme Court of the State of California, its Petition for a Writ of Review, asking and praying that a Writ of Review issue out of said Court commanding said Railroad Commission to certify to said Court, on a day named in said Writ, a full and complete record of all the proceedings leading up to the making of said Order and Decision dated May 21, 1914, together with said Order and Decision and your orator's Application for a Rehearing thereof; and also a full and complete record of all the proceedings leading up to the making of said Order and Decision dated November 15, 1916, together with said Order and Decision and orator's Application for a rehearing thereof, and that upon the return of such Writ, said Orders and Decisions of the said Railroad Commission be reversed and vacated and annulled upon the ground that said Orders and Decisions violate the rights of your orator under the Constitution of the United States, and more particularly

its rights under Section 10 of Article I thereof, and under Section I of Article XIV of the Amendments thereto; that the said Supreme Court of the State of California denied your orator's said Petition for a Writ of Review and refused to issue a Writ of Review, as prayed for in said Petition." (Record pp. 7 and 8, f. 13)

From a reading of this paragraph, it will be seen that the bill recites that appellant had *applied* to the Supreme Court of the State of California for a writ of review of the orders of the Railroad Commission complained of and had prayed said court to command said Railroad Commission to certify to said court a full and complete record of all of the proceedings leading up to the making of those orders and that upon the return of such writ said orders of the Commission be reversed and vacated and annulled upon the ground that said orders violated appellant's rights under the Constitution of the United States, *but that the said court denied appellant's petition for a preliminary writ and refused to even cause the record in the case certified by the Commission to be brought up.*

Thus it will be seen that the allegation of appellant's bill stated that the Supreme Court of the State of California did not have the record of the Railroad Commission before it, that said court did not hold a hearing and did not have the parties to the controversy before it. From said recital it will be seen that the Supreme Court of the State of California simply refused to entertain jurisdiction of the controversy.

Under the law of the State of California, the Supreme Court could neither affirm nor set aside the orders and decisions of the Railroad Commission complained of, until and unless it issued the preliminary writ of review directing the Railroad Commission to certify the record in the case to the Supreme Court; neither could the Supreme Court affirm or set aside the orders and decisions of the Railroad Commission complained of, until and unless the record of the Commission had been certified to said court by the Commission; neither could the Supreme Court either affirm or set aside the orders and decisions of the Commission, until all of the parties were before it; neither could the Supreme Court of the State of California either affirm or set aside the orders and decisions complained of, unless it held a formal hearing in the matter.

Each and every one of these contentions is supported specifically by Section 67 of the Public Utilities Act of the State of California, which reads in full as follows:

> "Sec. 67. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing the applicant may apply to the supreme court of this state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ *shall be made returnable* not later than thirty days after the date of the

issuance thereof, *and shall direct the commission to certify its record in the case* to the court. *On the return day, the cause shall be heard* by the supreme court, unless for a good reason shown the same be continued. No new or additional evidence may be introduced in the supreme court, *but the cause shall be heard on the record of the commission as certified to by it.* The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under the review violates any right of the petitioner under the constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. *The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission.* The provisions of the code of civil procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of manda-

> mus shall lie from the supreme court to the commission in all proper cases." (italics ours)
>
> (Sec. 67, Public Utilities Act of the State of California, Stats. of Cal., Extra Session 1911, p. 18, at p. 55)

It will thus be seen from these provisions of the Public Utilities Act of the State of California, that the Legislature deemed it wise to limit the manner in which the Supreme Court of the State should review the orders and decisions of the Railroad Commission. We specifically call the attention of the court to the provisions of the Section which we have italicized. We see, that the writ *shall be* made returnable; that the Railroad Commission *shall be* commanded to certify the record; that the cause *shall be heard* on the return day, unless for good cause continued; that the cause *shall be* heard *on the record as certified* by the Commission; that all parties *shall have* the right to appear and finally, that the Supreme Court *shall affirm* or *set aside* the commission's order *only upon the hearing.*

It is conceded, in this case that none of these things were done. (See Motion to Advance Cause, on file herein.) The Supreme Court of the State of California did not make the writ returnable; it did not command the Railroad Commission to certify the record; it did not hear the cause on the return day or any other time; it did not hear the cause on the certified record or any record of the Railroad Commission; it did not have before it all of the parties. In other words, the Supreme Court of the State

of California directly violated the plain provisions of Section 67 of the Public Utilities Act and refused to assume the jurisdiction conferred upon it by the Legislature of the State of California. Having refused to assume such jurisdiction, its action cannot now be said to be an adjudication upon the merits of the controversy. In face of the direct provisions of this Section that a preliminary writ should issue, it refused to issue such a writ. In face of the direct provisions of this Section that it have before it the certified record of the Railroad Commission, it refused to request of the Railroad Commission, such certified record. In face of the direct provisions of this Section, that it hold a hearing, it refused to hold such a hearing, in face of the direct provisions of this Section, that all the parties be brought before it, it refused to bring the Railroad Commission before it. The only action which the court took was to simply deny appellant's petition that a preliminary writ issue. Thus it will be seen that under the provisions of Section 67 of the Public Utilities Act of the State of California, the action of the Supreme Court of the State of California in this case cannot be held to be an adjudication of the controversy. The sole reason for the District Court's holding, that the controversy is *res judicata*, is the fact that the appellant filed a petition in the Supreme Court asking that a preliminary writ issue. No contention is made, or can be made, that the Supreme Court *lawfully* passed upon that petition, or rendered a judg-

ment thereon, in accordance with the laws of the State of California. On the contrary, as we have shown, the action of the Supreme Court in passing upon that petition was in direct violation of Section 67 of the Public Utilities Act of the State of California.

The learned District Judge cites the case of

> Williams v. Bruffy, 102 U. S. 248, 255; 26 L. Ed. 135,

in support of his conclusion that the matter is *res judicata.*

We beg to call the attention of this court to the very plain distinction existing between that case and the instant case. In the Williams case, it is quite clear that this court held that the action of the Supreme Court of Appeals of Virginia in refusing to issue the Writ of Supersedeas was *res judicata,* only because the Virginia court had passed upon the petition in the manner provided by the law of the State of Virginia. It is said:

> "By the law of that state, when application is made to the Supreme Court of Appeals for a Writ of Supersedeas, the court looks into the record of the case, and only allows the writ when of opinion that the decision complained of ought to be reviewed. Its action upon the record is, in effect, a determination whether or not it presents a sufficient question for the consideration of the court: If it deem the judgment of the court below 'plainly right', and reject the application on that ground, and its order of rejection so states no further application for the writ can be presented; the judg-

ment of the court below is thenceforth irreversible. So, in effect, its refusal of the writ on that ground is equivalent to an affirmance of the judgment, for the reason that the record discloses no error.

In the present case, the Supreme Court of Appeals denied the writ, stating in its order that it was of opinion that the judgment of the court of Rockingham County was 'plainly right.' "

(See Williams v. Bruffy, supra, at page 250)

What a difference between the action of the Supreme Court of Appeals of Virginia in that case and the action of the Supreme Court of California in this case? In the Williams case, the Virginia Court followed the statute, examined the record and determined that the judgment below was "plainly right". In this case the Supreme Court of the State of California did not follow the statute, it did not examine the record, it did not issue the preliminary writ, it did not hold the hearing provided for and it did not decide the case on the certified record. Therefore, can it be said that there is any analogy between these two cases? In the one case the court followed the law and acquired jurisdiction; in the other case the court did not follow the law and never acquired jurisdiction. The action of the Supreme Court of the State of California in refusing to issue the preliminary writ and in refusing to bring the certified record before it and hold a hearing upon the matter had the same result as if no petition had ever been filed in that court. The appellant here is in the

same position today as if it had never applied to the Supreme Court of the State of California for a preliminary writ. It cannot be bound by an alleged judgment of a court, which, upon the facts presented, had no jurisdiction to either affirm or reverse the orders complained of. The specific provisions of Section 67 of the Public Utilities Act are that the Supreme Court of the State of California can only affirm or set aside an order or decision of the Railroad Commission upon a hearing and upon the record as certified to by the Railroad Commission. It might just as well be claimed that that court could, without holding a hearing and without having the certified record before it, *reverse* a judgment as to claim that it could *affirm* an order without a hearing. There is no difference in that particular, so far as the law of the State of California is concerned. The law distinctly provides when and how the orders and decisions of the Railroad Commission can be either affirmed or reversed and the same proceedings must be had to affirm a judgment as to reverse one.

Under the specific provisions of Section 67 of the Public Utilities Act, we respectfully submit that the Supreme Court of the State of California has not affirmed the orders and decisions of the Railroad Commission complained of and that the action of said Supreme Court in refusing to pass upon the matter is not *res judicata.*

There is nothing in any of the other cases cited by the District Court in conflict with what we have said. We, of course, appreciate the difference between the case of Prentis v. Atlantic Coast Line Company, 211 U. S. 210, and the case of Detroit and Mackinac R. Co. v. Michigan Railroad Commission, 235 U. S. 402, founded as it is upon the distinction between the legislative and judicial functions.

The District Court has erred, however, in its conclusion that appellant has had its day in court. As we have already shown appellant never had its day in court because the Supreme Court of California did not follow the plain provisions of the Statute of California and proceed as the law directed it should proceed.

The cases cited by the District Court to the point that the denial by the Supreme Court to issue a preliminary writ was necessarily a final determination of the matter are not in point. The District Court seemed to utterly ignore the express provisions of Section 67 of the California Public Utilities Act and failed to appreciate the fact that the Supreme Court of California never followed the statute, while the courts in the cases cited in the opinion of the District Court did follow the statutes of their respective states.

A consideration of the authorities upon the general proposition of *res judicata* also supports our contention that an alternative writ must have issued; that there must have been a consideration of the controversy upon its merits; that there must have

been a hearing and that the court must have had all of the parties before it. The theory upon which *res judicata* may be pleaded has been expressed as follows:

> "A judgment is a bar because a matter once litigated should not again be drawn in question between the same parties or their privies."
>
> I Freeman on Judgments (4th Ed.), Sec. 247.

> "The judgment, however, must be on the merits such as to give the parties a full opportunity to be heard."
>
> I Freeman on Judgments (4th Ed.), Sec. 260;
>
> II Black on Judgments, Sec. 693.

Furthermore, in order that an estoppel upon the ground of a former adjudication may be pleaded by either party to the action, it must be mutual. That is to say, the judgment pleaded as a bar must be effective to the same extent against both parties to the record and be such that the party pleading it would be bound to the same extent by it as the other party so to be bound.

> "In the application of the rule *res judicata* it is essential that its operation be mutual. Therefore, a party will not be concluded against his contention by a former judgment, unless he could have used it as a protection or as a foundation of claim had the judgment been the other way, and conversely, no person can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case. Thus where the plaintiff is not a party to the record offered in evidence not being concluded by it

himself, he cannot rely upon it as a technical estoppel upon a garnishee."

II Black on Judgments, Sec. 548;

Valentine v. Mahoney, 37 Cal. 389.

In the proceedings before the Railroad Commission asserted to be a bar to this action, no opportunity of hearing was afforded either the plaintiff or the defendants. Thus, under the authorities above cited appellant was not barred because it was given no opportunity of being heard. There being no hearing or consideration of the case it was not heard and determined upon its merits. Furthermore, it is plain and we think it will be conceded by the counsel for the Railroad Commission that the defendants in these proceedings could not be precluded by the proceedings had before the California Supreme Court.

As we have already pointed out, under the provisions of Section 67 of the Public Utilities Act the California Supreme Court, upon the proceeding had, could not have *reversed,* the orders complained of. If, upon those proceedings, the Supreme Court had entered its judgment, *reversing* the orders of the Railroad Commission it is quite apparent that the Commission would not be bound thereby for the reason that no opportunity of being heard was afforded the parties and the matter was not decided upon its merits. That being so, the proceedings before the Supreme Court of California, cannot now be urged by *either* party, because the decision

set up was not *mutual,* and not being mutual, cannot be relied upon by either party.

> "When it appears from the record that the court never determined the merits of a controversy or rendered any judgment affecting the same, but dismissed plaintiff's action without trial and without evidence, such judgment does not support a plea of former adjudication."
>
> II Black on Judgments, Sec. 703;
>
> Hughes v. Walker, 14 Ore. 481; 13 Pac. 450.

In order to make the plea of *res judicata* available there must have been a final judgment on the merits and after a contest.

> I Van Fleet's Former Adjudications, Sec. 1.
>
> "Jurisdiction is the right to hear and determine, not determine without hearing, and where no appearance is allowed, there can be no hearing or opportunity of being heard and therefore no exercise of jurisdiction."
>
> Windsor v. McVeigh, 93 U. S. 274; 23 L. Ed. 914.
>
> "A judgment without a hearing is a nullity."
>
> Hovey v. Elliott, 167 U. S. 409; 42 L. Ed. 215.
>
> "A former judgment will not operate as a bar to a subsequent suit upon the same cause of action, unless the proceedings and judgment in the first case involved or afforded full legal opportunity for an investigation and determination of the merits of the suit."
>
> 23 Cyc. 1131.

As we have shown the *legal opportunity* for hearing prescribed by statute was not followed.

"But it must appear that the judgment was rendered upon a legal trial of the action or at least a full opportunity for such trial involving a consideration of the merits of the case and settling the issues alleged to be concluded by it by a judicial decision entered either on the findings of the court, the verdict of the jury or notwithstanding the verdict."

23 Cyc. 1226.

"The decision of a motion for summary application is not to be regarded in the light of *res judicata* or as so far conclusive upon the parties as to prevent the drawing of the same matter in question again in the more regular form of an action."

Denny v. Bennett, 128 U. S. 489.

"If, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered in evidence."

Russell v. Place, 94 U. S. 606.

As we have already pointed out the Supreme Court of California did not, in the proceedings relied upon by defendants, issue its alternative writ therein, thereby assuming jurisdiction and bringing the matter before it for consideration. The action of the court can be deemed of no greater force or effect than the granting of a non-suit and it is held that neither the granting of a non-suit nor the dismissal of an action can be considered an adjudication of the matter.

II Black on Judgments, Sections 699 and 703;

23 Cyc. 1136 and 1230.

We believe that an understanding of what actually occurred in the Supreme Court of the State of California and an appreciation of the fact that no hearing was had in that court and no consideration was given to the application as required by law is a sufficient answer under the authorities heretofore cited, to defendants' contention that that application is a bar to any further proceedings in this court. There is, however, an entirely separate and distinct ground, which we urge as an answer to defendants' contention. That is, that no judgment of a state court, on a question involving rights claimed under the Constitution of the United States, is a bar to any proceeding in a federal court wherein such rights are set up.

B. THE RIGHTS RELIED UPON BY PLAINTIFF ARE RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION AND NO DECISION OF A STATE COURT CAN PRECLUDE THE FEDERAL COURT FROM ENFORCING THOSE RIGHTS.

Upon examination of the cases involving the points raised by defendants, we find a distinction observed by the courts, as to what decisions of the state courts will be regarded as *res judicata*. It has sometimes been held, that the federal courts will follow the decisions of the state courts upon questions of facts, even in cases involving federal questions. They will not be bound, however, by the determination of the state courts that the federal constitutional rights of the party have or have not been violated. In other words, when a contract is

brought before a federal court, the court, while following the decision of the state court as to the existence of the contract and the construction placed upon it, yet will reserve to itself the right to determine whether any rights guaranteed by the United States constitution or its statutes have been impaired.

This distinction and the rule stated is well illustrated by the case of

City of Mitchell v. Dakota Central Telephone Company, 246 U. S. 396.

The action in that case was filed by the Dakota Central Telephone Company in the Federal District Court for the District of South Dakota to review a decree enjoining the enforcement of a municipal ordinance terminating the right of a telephone company to maintain and operate a local telephone service. The rights of the company turned upon two ordinances of the City of Mitchell. The city pleaded a judgment rendered in a suit in which it was complainant against the company, wherein these two ordinances were construed and by which it was contended that the rights asserted by the company were adjudicated against it, and prayed by reason thereof that the bill of the company be dismissed. The District Court, however, refused to be bound by the judgment of the State Court, because it held, that the company invoked rights under the constitution of the United States, and, assuming jurisdiction of the action, rendered a decision contrary to that rendered by the state court. This court upheld

the right of the District Court to ignore the judgment of the State Court and stated in regard to this action of the District Court as follows:

> "We shall spend no time in vindication of the exertion of the right. It is an established right of federal courts when the contract clause of the constitution of the United States is invoked."
>
> City of Mitchell v. Dakota Central Telephone Company, supra, at pp. 407 and 408.

This court then proceeded to consider the case upon its merits and after such consideration agreed with the construction placed upon the ordinances by the Supreme Court of the state and accordingly reversed the judgment of the United States District Court.

It is apparent from a consideration of this opinion that this court did not consider the District Court either precluded from deciding the case, or bound by the judgment of the state court, for it is further said upon page 411 of the opinion that:

> "But if the decisions of the state court be not given that extent, *as it is not by the District Court,* and if it be considered that the latter court had a right as a federal court to determine the existence of a contract and its elements, such right does not preclude a deference to the views of the state court, etc."

It will be noted that the opinion does not sustain the syllabi in what is said concerning *res judicata,* even though the syllabi is speaking only of the effect

of the judgment of the state court upon the construction of the contract.

Another case is that of

Hendrickson v. Apperson, 245 U. S. 105.

In that case it was held that the construction of a contract by the state court will be followed by the United States Supreme Court, but that the determination of the question whether the contract, as construed, impaired any rights under the constitution of the United States would be decided by the United States Supreme Court, irrespective of the decision of the state court in the same case.

> "In a suit in a federal court respecting the question whether the state was attempting to impair the obligation of a contract a decision that this question was *res judicata* as against the state, does not oust the federal jurisdiction on the theory that it makes the case turning on a question not federal."

Foster's Federal Practice, p. 66;

Bank of Kentucky v. Stone, 88 Fed. 383;

Stone v. Bank of Kentucky, 174 U. S. 799.

> "The fact that a judgment in a state court is *res judicata* of the questions litigated in an action removed to the federal courts, does not deprive the latter court of jurisdiction where a federal question is involved."

12 Cyc. 389.

Consolidated Wyoming Gold Mining Company v. Chanpion Gold Mining Company, 62 Fed. 945;

See also

National Bank of Republic v. Brookland City, etc. R. Co., Fed. Cas. No. 10,039; 14 Blatch. 242, affirmed in 102 U. S. 14; 26 L. Ed. 61.

"The federal courts will not be bound by a decision of any state court that the state act in question is not a contract within the purview of the United States constitution. To do so would be substantially to give up its jurisdiction under the Judiciary Act."

Jefferson Branch Bank v. Sckelly, 66 U. S. 437; 17 L. Ed. 173.

"If the controversy in a federal court involve a federal question, then that court must decide for itself, treating a state decision with due consideration, but not as foreclosing independent judgment. In construing or determining the validity of a state statute involving a federal question, the national courts are not bound by the decision of the state court. The rule that the construction of a state statute by the highest court of the state is conclusive on a federal court, does not apply where a federal question is involved, as where a complainant contends that it acquired contract rights under such statute which are protected from impairment by the federal constitution."

Sunset Telephone & Telegraph Company v. City of Pomona, 164 Fed. 561.

"The decisions of state courts as to the validity of state statutes are not binding upon the federal courts so far as rights secured under the federal constitution are concerned."

Knapp v. Bullock Tractor Company, 242 Fed. 543.

"Whatever views a state court may have expressed regarding the validity of a state statute under the federal constitution, the courts of the United States must decide the question according to their own conviction."

Orr v. Allen, 245 Fed. 486.

"A decision of a state court affirming the constitutionality of a state statute is not conclusive on the federal courts where the statute is attacked as in violation of the federal constitution."

Webb v. Southern Railway Company, 248 Fed. 619.

The opinion of the District Court cites the case of

Detroit & M. R. Co. v. Michigan Railroad Commission, 235 U. S. 402; 59 L. Ed. 288,

as upholding the conclusion that this court is bound by the so-called judgment of the California State Supreme Court. In that case it appeared that the railroad company had brought a proceeding in a court of competent jurisdiction in the State of Michigan; that there had been a hearing, findings and judgment on the merits of the action. The state court construed the contract in a certain way. The rights of the company depended upon the construction of that contract. All that this court held in that decision was, that the railroad company was bound by the construction placed upon the contract by the state court. However, if the contract as construed by the state court had clearly been in violation of the

company's constitutional rights, it is certain that this court would not have considered itself bound by that decision. On the contrary, as shown by the cases cited by us, the decision would have been the other way, for the United States Supreme Court has never held itself bound by a decision which is clearly against constitutional rights.

In the case at bar, defendants, by demurring to our complaint, have for the purpose of this argument, admitted the existence of the contract; that this contract is a right protected by the constitution of the United States and that the orders of the Railroad Commission complained of impair the obligation of that contract. How different are the facts of this case from the Detroit case! There, under the construction of the contract, placed upon it by the state court, it was admitted that the railroad company had no rights under the federal constitution.

The question at issue there was as to the construction of the contract. The question involved here is the constitutional rights of this appellant. We believe that this difference is so plain and fundamental that it does not require any further consideration at our hands.

We, therefore, submit that the controversy is not *res judicata*, first, because there was no judgment in the court below, such as can be pleaded as a bar, and second, that no judgment of a state court can be a bar to a subsequent proceeding in the federal

court where rights under the federal constitution are invoked.

Part II.

A. APPELLANT HAS BEEN DEPRIVED OF RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION.

Having shown that the controversy is not *res judicata*, we shall now proceed with a discussion of the merits of the controversy and show that the contracts relied upon by this appellant are within the protection of the Constitution of the United States, particularly under Section 10 of Article I and under Section 1 of Article XIV of the amendments thereto; that the defendants, as members of the Railroad Commission of the State of California, did not regularly pursue their authority in making the orders complained of and that they were wholly without jurisdiction to set aside or alter the contracts relied upon by appellant. Before, however, entering into a discussion of the legal points involved, we shall ask the indulgence of the court in presenting, as briefly as a clear understanding of the situation will permit, a statement of the contractural relation of the parties and the proceedings before the Railroad Commission.

B. STATEMENT OF FACTS.

In 1911 petitioner entered into a contract with one Armstrong, a copy of which contract, marked "Exhibit A", is attached to the petition (Record

pp. 11-13, ff. 19-23). As is shown by the contract, Armstrong agreed to organize a corporation to serve Calistoga, and the territory adjacent thereto, and to transfer said contract to said corporation when organized. This was done. The Calistoga Electric Company was organized and that corporation assumed all rights and obligations under said contract. Subsequently the Calistoga Electric Company sold, assigned, transferred and delivered to the California Light & Telephone Company, likewise a California corporation, all of the existing contracts to which the Calistoga Electric Company was a party, with all of the rights, obligations and burdens of said contract. In this manner the California Light & Telephone Company became a party to the said Armstrong contract in the place and stead of said Calistoga Electric Company, so that at the present time the California Light & Telephone Company stands in the place and stead of Armstrong in respect to these contracts. (Record p. 8, f. 14)

A full appreciation of our contention makes necessary a complete understanding of the relations of appellant to the Calistoga Electric Company, E. L. Armstrong, its predecessor in interest, and the California Light & Telephone Company, its successor in interest.

The circumstances under which the original contract was made are set forth in paragraphs IV and V of the petition.

"IV.

"That your orator, Napa Valley Electric Company, now is and for more than ten years last past has been, engaged in supplying and distributing electric energy and power for domestic use to certain individuals in the town of St. Helena, and vicinity, in the County of Napa, State of California, and also in supplying and distributing electric energy and power to the said town of St. Helena in the said County of Napa; that your orator now is, and for about seven (7) years last past has been, engaged in selling electric energy and power to the said Calistoga Electric Company. That the said Calistoga Electric Company is not a consumer of said electrical energy and power, but, on the contrary, is a distributing agency of your orator, and that your orator is not performing any public service in supplying the said Calistoga Electric Company with electric energy and power, and that your orator is not, as to said Calistoga Electric Company, a public utility;

V.

That in 1911 the inhabitants of the town of Calistoga, in the said County of Napa, State of California, were being served with electric energy from a distributing plant owned by one William Spiers. That at said time the Napa Valley Electric Company, your orator, was a public utility corporation, duly organized and existing under and by virtue of the laws of the State of California, actively engaged in operating its business, and supplying and furnishing the inhabitants of St. Helena, and the vicinity thereof, with electric power for domestic, illuminating and power purposes, as aforesaid; that at said time your orator was desirous of extending its distributing system and entering the town of Calistoga and of supplying its inhabitants with electric energy, and was actually extendng its lines into the Calistoga territory;

that in the year 1911, and while your orator was extending its distributing system into the Calistoga territory, as aforesaid, the said Spiers offered his said plant and business for sale and began negotiations with your orator for the sale thereof; that your orator and said Spiers were about to reach an agreement for the sale of said plant and business by said Spiers to your orator, and your orator was about to purchase the said property, when one E. L. Armstrong offered to enter into a certain contract with your orator, as hereinafter more particularly set forth; that said Armstrong was at said time the owner of the Calistoga Water Company, a public utility corporation, organized and existing under and by virtue of the laws of the State of California, and serving the inhabitants of the town of Calistoga with water; said Armstrong thereupon made the following proposition with your orator, to wit:

That by reason of the ownership of said Water Company he could operate the said electrical business, then owned by Spiers, in conjunction therewith in such a manner as to save considerable overhead expense; that he was desirous of purchasing the said electrical business, but that he would not do so if your orator entered said Calistoga territory, then being served by said Spiers; that your orator should drop all negotiations with Spiers for the purchase of said property and permit him, Armstrong, to purchase it at a reasonable figure; that your orator should further agree not to extend its lines into the Calistoga territory, and not to serve the inhabitants of Calistoga, and not become a competitor of Armstrong; that in consideration of said agreement and action on the part of your orator, he, the said Armstrong, would buy all electric energy to be sold by him to his customers from your orator; that thereupon your orator accepted said offer of Arm-

strong and entered into a written contract, dated May 13, 1911, with said Armstrong, wherein and whereby said Armstrong agreed to buy from your orator all of the electric energy to be sold by him for a period of eighteen (18) years, from date of said contract, at three (3¢) cents per K. W. H.

That a copy of said contract marked Exhibit 'A' is attached hereto and is hereby especially referred to and made a part hereof with the same force and effect as if recited in full herein; that according to the provisions of paragraph 'Seventh' of said contract your orator agreed not to solicit or take business in the territory of Napa County to be served by said Armstrong; that said Armstrong would not have purchased the said property from the said Spiers if your orator had not agreed to remain out of said territory; that if said contract had not been entered into, your orator would have entered the said territory then being served by said Spiers, but that relying upon said contract with said Armstrong, your orator ceased extending its distributing system into the said Calistoga territory, and abandoned said territory to said Armstrong and gave up all of its rights to serve that territory and all anticipated profits to be derived from the business thereof; that at the date of said contract, and at the time your orator was extending its lines into the Calistoga territory, your orator had the legal right to so extend its lines and to become a competitor of Spiers and Armstrong, his successor; that under the then existing provisions of Section 19, Article XI, of the Constitution of the State of California, it was the policy of the said State of California to extend such right and to encourage such competition."

(Record pp. 2 and 3, ff. 3-6)

It will thus be seen that appellant gave up valuable rights in entering into the contract and it must be plain that it has been deprived of valuable rights by the order of the Railroad Commission complained of.

The relation of appellant with Armstrong and the two companies which succeeded to the contract cannot, of course, be affected in any way by appellant's relations with others. While it is true that appellant held itself out to serve and actually did serve the inhabitants of St. Helena, that fact can in no way aid the present holder of the contract. Appellant's functions toward the public were and are entirely different than those toward the holders of the contract. In supplying the inhabitants of St. Helena appellant was performing a public function. In supplying the holders of the contract appellant was merely performing the obligations of a private contract. In the one case, appellant could have been compelled to supply any consumer of electricity within the territory served by it, but appellant could not have been compelled to sell electric energy to either Armstrong or to his successors, which energy was, in turn, retailed by them. Neither Armstrong, the Calistoga Electric Company nor the California Light & Telephone Company were or are consumers of electricity. They are not part of the public. They are simply retailers of electricity, buying from appellant and re-distributing to the public at a profit. Appellant has no relation with their consumers. Appellant now furnishes the

California Light & Telephone Company, the present holder of the original Armstrong contract, with electricity which that company, in turn, sells to the public. That electricity is furnished the California Light & Telephone Company by appellant under the original Armstrong contract and not as part of the public. It must be conceded that appellant is under no obligation whatsoever to furnish the California Light & Telephone Company with electric energy and that if it refused to do so it could only be reached by an action for breach of contract. The rates at which it sells that electricity to the California Light & Telephone Company is a matter of private concern between that corporation and appellant. The rights of the public are not involved in any way and the rates at which the California Light & Telephone Company shall resell to the public are not fixed nor determined in any manner by the rate which that company pays appellant. We shall discuss this point more fully further on.

Calistoga Electric Company, during a portion of the time that it was a party to the Armstrong contract, refused and the California Light & Telephone Company at the present time refuses to acknowledge their liabilities under said contract. This refusal is based solely upon the claim that the State of California, under its police power, has the right to change the rate for electricity as fixed by said contracts or even to abrogate the contracts in their entirety. Accordingly these corporations appealed to

the Railroad Commission of the State of California to set aside the contract and to fix other and different rates than those therein agreed upon. We do not believe it necessary for the purpose of this brief to enter into a full recital of what transpired before the Railroad Commission, other than to say that the commission made two orders respecting this contract, both of which asserted the right, power and jurisdiction of the Railroad Commission to alter this contract in any respect which the commission desired, and indeed to abrogate it altogether, and this in spite of the fact that this appellant, who was defendant in these proceedings, set up as its defense its rights under the Constitution of the United States, which are herein set up. The Railroad Commission of the State of California having violated the rights of petitioner which are protected by the Constitution of the United States, we now invoke the protection of this court.

Defendants below moved to dismiss the bill of appellant upon the ground that it did not state a cause of action entitling appellant to any relief. Defendants' contention below was that the Railroad Commission had full jurisdiction of all the rates established by the Armstrong contract and pointed to the various provisions of the Constitution of the State of California and of the Public Utilities Act (which, under the authority of Pac. T. & T. Co. v. Eshleman, 166 Cal. 640, have all the force of constitutional provisions), upon which defendants relied to establish their contention. We shall not here stop

to quote or to discuss any of those provisions. It is immaterial what those provisions are, because it is plain that regardless of them, and even assuming that they do pretend to grant the commission power to abrogate all contracts, yet they can grant no rights to defendants to abrogate or impair the rights of this appellant which are protected by the Constitution of the United States. As was said by the Supreme Court of California in the case of Pac. T. & T. Co. v. Eshleman, supra, at pages 660 and 661:

> "This constitutional decree is, of course, binding upon this court and under which it becomes the duty of this court to lend its aid in giving effect to every power and prerogative with which the Legislature may vest or clothe the railroad commission. This, however, is subject to one all-important limitation. There is still the constitution of the United States—the supreme law of this state, supreme over its constitution and over its legislature; and of no protection accorded by that instrument to a litigant before this court can that litigant be deprived. Therefore, if it shall be that among the powers conferred by the legislature upon the railroad commission are those whose exercise by that commission do violence to a petitioner's rights under the constitution of the United States, protection under that constitution will be awarded him. The fourteenth amendment to the constitution of the United States prohibits a state from depriving any person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws. The petitioner here insists that by the order of the commission it is deprived of the equal protection of the laws of

this state in violation of its rights under the constitution of the United States."

We, therefore, shall not stop to analyze the provisions, either of the state Constitution or of the acts of the Legislature, because it is certain that irrespective of what the Constitution of California or the acts of the Legislature may attempt to say, they cannot deprive this appellant of any of its rights under the Constitution of the United States. We come before this court in this action contending that the orders of the Railroad Commission of the State of California are in direct violation of petitioner's rights under the constitution of the United States, particularly under Section 10 of Article I and Section 1 of Article 14 of the amendments thereto.

Our contention that these orders are in violation of petitioner's constitutional rights is that:

C. THE ORDERS OF THE RAILROAD COMMISSION ARE NOT A PROPER EXERCISE OF THE POLICE POWER OF THE STATE, IN THAT NO RIGHTS OF THE PUBLIC ARE AFFECTED THEREBY IN ANY WAY.

The basis of the power of the state to regulate any business is, that the business is one of *public* interest and concern. This being granted, the discussion then at once resolves itself into the proposition of whether or not public interest and concern is involved in any way with the rates between this petitioner on the one hand and Armstrong, Calistoga Electric Company, his successor in interest, and California Light & Telephone Company, the present

party to the contract, on the other hand. It seems to us to be entirely obvious, that this is a private contract in which the public has no interest or concern. The other party to the contract is an independent concern standing between this appellant and the public. Appellant does not either directly or indirectly serve the customers of the California Light & Telephone Company. Appellant has no contractual or other relation with those customers. They do not know appellant. The only people with whom they deal are the California Light & Telephone Company.

It has been definitely held by the Supreme Court of California that the sale of water in bulk to a company, which in turn resold the water to the public, did not constitute the seller a public utility nor the purchaser a consumer so as to subject the contract and the rates established therein to the police power of the state.

(See Marin Water etc. Co. v. Town of Sausalito, 168 Cal. 587.)

It will be claimed that the rates at which this petitioner shall sell under the contract are of public concern, upon the theory that those rates form a basis upon which the Railroad Commission in turn fixes the rates to be charged the consumers buying from the California Light & Telephone Company. This argument is entirely fallacious. The Railroad Commission has never recognized the *actual* cost of securing electrical current as a basis for fixing rates. The commission only permits a return upon

what it finds to be the reasonable cost of producing current. What they think it ought to be and not what the company actually pays. This is illustrated as follows:

In determining the rate at which electricity shall be sold to the public, the commission first determines the value of the investment. This is done by going at the proposition from several different angles. The commission attempts to ascertain what the original cost was and then determines whether that original cost was a *proper* and *reasonable* cost. Only in cases where it determines that the original cost was proper and reasonable will it fix that as a basis for rate fixing purposes. In arriving at its conclusion as to what is the reasonable value, the commission also ascertains what the present reproduction value, both new and depreciated, is. This, for the purpose of ascertaining whether the original and actual cost was proper or not. To the percentage of income allowed upon the value of the plant is then added items for depreciation, interest on outstanding bonds, a sinking fund to redeem the bonds, etc. Then comes the item of overhead. This item includes such current expenses as are approved by the Railroad Commission. For instance, the commission will not allow rates to take care of salaries which they think are not justifiable. The commission, however, has recognized the fact that it cannot prevent the corporation from paying such salaries as it sees fit, but only has refused to permit rates to be based upon unreasonable salaries. The corporation can pay its president a salary several

times greater than that which the commission will permit rates to be based upon. In other words, it is no public concern what a corporation pays its officials. The only concern of the public is the amount which the commission will recognize as a basis for rate fixing purposes. The corporation may, and very often does, pay a greater salary to its officials than the commission will recognize as a rate fixing basis.

These questions as affecting the power of the Interstate Commerce Commission to regulate rates are discussed in Beale & Wyman, Railroad Rate Regulation (Second Edition) under the title "Operating Expenses" and commencing with Section 444 the question of salaries paid officials, cost of supplies, etc., are dealt with.

The distinction that we have above attempted to draw is recognized and the Interstate Commerce Commission permits rates only upon *reasonable expenditures, but no attempt has ever been made to set aside contracts with officials and for costs of supplies.* On the contrary, it is recognized that these contracts are binding upon the corporation, regardless of what rates are allowed.

> "Improvident management of the road is primarily a matter of internal or corporate concern to be dealt with by the corporation and its creditors among themselves."
>
> Beale & Wyman, Railroad Rate Regulation (Second Ed.) Sec. 347.

The only restriction that the commission has ever placed upon such contracts of the corporation is a

refusal to permit the corporation to get such expenditures back by charging it up to the public through exorbitant rates. If the corporation chooses to enter into improvident contracts, it would, of course, be bound by the contract, so far as the other party to the contract was concerned.

In the present case Napa Valley Electric Company stands in the same relation to the California Light & Telephone Company as a generating plant would stand to that company, that is to say, appellant sells to it at wholesale rates the electricity that it furnishes to the public. It can pay appellant whatever price it sees fit and, as we have shown, that price which it pays appellant does not, by any means, determine the rate which shall be charged the public. The loss, if any, must come out of the stockholders. Therefore, the public has no concern in the contract between the two companies. Counsel might as well claim that the commission has a right to fix the rate at which a public utility shall purchase its power site, generators, transmitters, and other equipment, as to say that the commission has any jurisdiction over this contract.

Under the statement of facts of the case, the only other theory of dealing with appellant and the California Light & Telephone Company, the public's vendor, is to treat them as performing jointly a public service and to consider the ultimate rate charged to the public as in the nature of a joint rate. If that be the theory upon which these corporations are to

be treated and the ultimate rate to the public fixed, again it must be conceded that the public has no interest in the division of profits among the corporations.

> "Divisions of the joint rates between the carriers concurring therein are matters of private agreement, and for that reason, generally speaking, are of no special concern to shippers, nor are they essential to legalize a public through rate."
>
> Beale & Wyman, Railroad Rate Regulation (Second Ed.), Sec. 842.

> "Divisions of joint rates are ordinarily not published and are subject to change by mutual agreement of the carriers."
>
> Beale & Wyman, Railroad Rate Regulation (Second Ed.), Sec. 899.

From the foregoing facts and authorities it is plain that the public has no concern in the division of profits between this petitioner and the California Light & Telephone Company. In the proceedings before the Railroad Commission wherein the orders complained of were made, the Calistoga Electric Company was then the holder of the contract. In all these proceedings none of the rights of the public were taken into consideration. The Calistoga Electric Company petitioned for a reduction of its contract rates upon the theory—indeed it is specifically alleged—that it was a *consumer* of electricity. (Record p. 14, f. 25.) The orders of the Railroad Commission did not consider the public as being affected at all. It was merely decided, that in the opinion of the commission, the Napa Valley

Electric Company was making too much money out of its service to the Calistoga Electric Company and the Commission then proceeded to give a part of those earnings to the Calistoga Electric Company without requiring that they be passed on to the public.

The basis of the jurisdiction of the commission over contracts is that of public welfare. That is the rule as laid down in Munn v. Illinois, 94 U. S. 113.

Mr. Justice Field, who dissented in that opinion, later on wrote the decision in Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174; 32 L. Ed. 377, where he said:

> "There had been differences of opinion among the judges of this court in some cases as to the circumstances or conditions under which some kind of property or business may be properly held to be affected as in Munn v. Illinois, but none as to the doctrine that when such use exists the business becomes subject to legislative control in all rights necessary *to protect the public against danger, injustice and oppression.*"

That is the only theory upon which the commission can interefere and set aside contracts. In this case, as we have shown, the public is not interested and is not in danger of suffering injustice and oppression. That being the case, the commission was wholly without jurisdiction to change the terms of these contracts.

> "Public utility commissions cannot determine controversies or enforce contracts of a

private character between railroad companies and individuals."

33 Cyc., 48 (Note 53, and cases cited).

"If a state legislature attempted to abrogate a contract between two carriers or between a carrier and one of its patrons simply in order to relieve one of the parties to that contract from a burdensome obligation, such statute might well be declared unconstitutional * * *"

Reader on "Validity of Rate Regulation," Sec. 198.

The Supreme Court of California has several times recognized the fact that there were certain contracts of a private nature over which the commission had no jurisdiction.

Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California, 173 Cal. 577;

Allen v. Railroad Commission et al., 56 Cal. Dec. 326; 175 Pac. 466.

In the last named case it was very clearly held that a corporation could be a public utility as to the public generally and at the same time retain the right to enter into private contracts with certain individuals. The decision in this case answers any argument which may be made to the effect that because this appellant performs a public service as to the inhabitants of St. Helena that it necessarily is also a public utility in its relation to the holders of the Armstrong contract. In the Allen case the corporation entered into certain contracts

with owners of land to supply those owners with water for the land and also held itself out as a public utility to supply the wants of the City of Hemet. The Supreme Court of California held that the contracts between the owners of the land and the corporation were private contracts over which the Railroad Commission had no jurisdiction, although it was conceded that the corporation was, as to the City of Hemet, a public utility. Answering the argument that because the corporation was performing a public service as to the inhabitants of the City of Hemet that it was necessarily a public utility as to the owners of the land, the court said:

> "Treating first of the facts above set forth as establishing or failing to establish the public service character of applicant, it may at once be said that when it engaged to supply the townsite and the succeeding City of Hemet with water for municipal and domestic service and proceeded to do this thing, it became a public service corporation, at least insofar as the needs, present or future, of the growing City of Hemet were concerned. But, of course, it does not follow, either in law or in reason, that because of this, it had dedicated all its water to public use. Today the City of Hemet requires but 1½%, or at the utmost 3%, of those waters. It would be little short of ridiculous to contend that upon the 97% remaining had been imposed the same servitude. Our decisions fully recognize that a private water company may be organized to sell water for purposes of private gain and not in so doing become a public utility. (Thayer v. California Development Company, 164 Cal. 117.) Further, that a company having a single and undi-

vided supply of water (if that circumstance be considered of consequence) may devote its properties and a part of those waters to public service and may retain a part for the advantages of private sale, and not become a public service corporation as to all by virtue of the dedication of a part."

Allen v. Railroad Commission, 56 Cal. Dec. at page 333.

See also

Marin Water etc. Co. v. Town of Sausalito, 168 Cal. 587.

Thus it will be seen that under the decisions of the Supreme Court of the State of California a corporation which performs a public service may still retain the right and power to enter into contracts of a private nature with certain individuals, which contracts come within the protection of the Constitution of the United States and over which the Railroad Commission has no jurisdiction. In this case the very contract sought to be abrogated by the Railroad Commission is of such a nature. As we have shown, they are contracts existing between the holders of the Armstrong contract and this appellant fixing the wholesale price of electricity bought by the holder of that contract. The public has no concern with the price paid for such electric energy. It does not enter into the calculation of the Railroad Commission when it in turn fixes the rate to be charged the public by the holder of that contract. All that the Railroad

Commission inquires into or can inquire into is the reasonable value of such electric energy.

Upon the oral argument of this matter in the District Court the learned District Judge expressed the opinion that these contracts were valid and beyond the jurisdiction of the Railroad Commission. In expressing such opinion he put the following query to the attorney for the commission:

> "If the Peoples' Water Company (the company supplying the people of Oakland) should run short of water and purchase, say, 100,000 gallons from the Spring Valley Water Company (the company supplying the people of San Francisco) would the Railroad Commission have the power to fix the price for the sale of that water? I think not."

Carrying the suggestion of the learned District Judge a little further, we submit that if the commission has the right to interfere with appellant's contract it likewise has the right to fix the division of every joint rate in the state, to say what any certain public utility shall pay any other public utility for the temporary use of its rolling stock and certainly to say what any electric company shall pay for the lease or purchase of a power site and for the erection of its plant and for its transmitters, generators and other equipment.

We believe it plain upon the statement of the facts that the commission has no such jurisdiction; that its only concern is to fix the ultimate rate to be paid by the public and not in any way to interfere with the private contracts of such companies

or the division of profit among companies performing a joint service.

Wherefore, we respectfully submit that the decree dismissing appellant's bill in equity should be reversed and that this court should enter its judgment annulling the orders and decisions of the Railroad Commission complained of.

Dated, San Francisco,
November 22, 1919.

Respectfully submitted,

MILTON T. U'REN,
Solicitor for Appellant.

DEC 4 1919
JAMES D. MAHER,
CLERK

October Term, 1919.

IN THE

Supreme Court of the United States

NAPA VALLEY ELECTRIC COMPANY, a corporation,
Appellant,
vs.
THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al.,
Appellees.
No. 401.

BRIEF OF APPELLEES

DOUGLAS BROOKMAN,
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THE RECORDER COMPANY, 650 STEVENSON ST., S. F.



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IN THE

Supreme Court of the United States

October Term, 1919.

NAPA VALLEY ELECTRIC COMPANY, a corporation, *Appellant,* vs. THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al., *Appellees.*	No. 401.

BRIEF OF APPELLEES

I.

STATEMENT OF CASE.

A. Facts.

Napa Valley Electric Company is a public utility corporation engaged in supplying, for compensation, electric energy for light, power and other purposes in and about the town of St. Helena, Napa County, California. Calistoga Electric Company is likewise a public utility corporation engaged in supplying electric energy in and about the town of Calistoga, Napa County, California. Both companies are public utilities within the provisions of the Public Utilities Act

of California (Stats. 1911, Ex. Session, p. 18, as amended Stats. 1913, p. 934), and are subject to regulation by the Railroad Commission of California, hereinafter referred to as the Railroad Commission.

The electric energy supplied by Calistoga Electric Company is purchased from Napa Valley Electric Company under a contract dated May 13, 1911, between Napa Valley Electric Company and E. L. Armstrong, predecessor of Calistoga Electric Company. (Tr., 11-13.) This contract prescribes the wholesale rate to be charged for the electric energy so supplied.

B. Proceedings Before the Railroad Commission.

On November 18, 1913, Calistoga Electric Company filed a formal complaint with the Railroad Commission (Tr., 14) attacking, as discriminatory and unreasonable, the wholesale rate charged for electric energy delivered to it by Napa Valley Electric Company and asking the Railroad Commission to fix a just and reasonable rate. Napa Valley Electric Company filed an answer (Tr., 15) and supplemental and amended answer (Tr., 17) to the complaint, in which it was claimed that the Railroad Commission had no jurisdiction over the wholesale service in question, and could not alter the rate prescribed in the contract.

On January 24, 1914, the Railroad Commission, of its own motion, instituted an investigation into the reasonableness of all of the rates charged for electric energy supplied by Napa Valley Electric Com-

pany. (Tr., 4.) These two proceedings were consolidated for hearing before the Railroad Commission, and thereafter, on May 21, 1914, the Railroad Commission rendered its opinion and order prescribing a schedule of rates found to be reasonable for electric energy supplied by Napa Valley Electric Company. (Tr., 21-38.) This schedule prescribed a rate for electric energy supplied to Calistoga Electric Company lower than that named in the contract between Napa Valley Electric Company and E. L. Armstrong, precedecessor of Calistoga Electric Company. On June 20, 1914, Napa Valley Electric Company filed with the Railroad Commission a petition for a rehearing of these proceedings, which petition for rehearing was denied on July 11, 1914. (Tr., 5.)

Napa Valley Electric Company took no steps, whatever, to have the order of the Railroad Commission in these proceedings reviewed by either the Federal or State Courts.

On June 27, 1916, Calistoga Electric Company filed a second formal complaint with the Railroad Commission, asking for the establishment of a different and lower rate for electric energy supplied to it by Napa Valley Electric Company than the rate already fixed by the previous order of the Railroad Commission (Tr., 6), and also lower than the rate named in a certain agreement entered into by these two companies subsequent to the order of the Railroad Commission, which agreement was, however, expressly made subject to the approval of the Railroad Commission (Tr., 38, 39), which approval was never granted. (Tr., 41.)

Napa Valley Electric Company, on June 28, 1916, filed with the Railroad Commission an application asking the Railroad Commission to modify its order of May 21, 1914, so as to prescribe a rate for electric energy supplied to Calistoga Electric Company, in accordance with the rate named in said agreement. (Tr., 6.) Napa Valley Electric Company also on July 27, 1916, filed an answer to this second formal complaint of Calistoga Electric Company, claiming again in the answer that the Railroad Commission had no jurisdiction to revise the rate specified in the original contract. (Tr., 6.) These two matters were consolidated for hearing and on November 15, 1916, the Railroad Commission rendered its opinion and order (Tr., 40-45), stating, with reference to the rate agreed upon by the companies subsequent to the previous order of the Railroad Commission that "the Commission never either approved or disapproved said contract, and as it was a modification of the rate formerly established by the Commission, and a modification which might result in either decreasing or increasing the legal rate according to the amount of energy consumed by complainant; the modified rates thus sought to be established, but which were never approved by the Commission, never became effective" (Tr., 41); and after reviewing the evidence, the Railroad Commission established a new rate for electric energy to be supplied to Calistoga Electric Company by Napa Valley Electric Company, which rate was slightly lower than the rate prescribed in the earlier order of the Railroad Commission and, of course, lower than the rate named in the original

contract between Napa Valley Electric Company and E. L. Armstrong.

On December 20, 1916, Napa Valley Electric Company filed with the Railroad Commission a petition for rehearing in these proceedings (Tr., 46-57), which application for rehearing was, on May 24, 1917, denied by the order of the Railroad Commission. (Tr., 7.)

C. Proceedings Before the Supreme Court of California.

Thereafter, to-wit, on June 20, 1917, Napa Valley Electric Company filed with the Supreme Court of California a petition under Section 67 of the Public Utilities Act, to review the orders of the Railroad Commission above mentioned, fixing the rate to be charged for electric energy supplied by that company to Calistoga Electric Company. The Public Utilities Act of California (Stats. 1911, Ex. Session, pp. 18-55) provides in part:

> "Within thirty days after the application (to the Railroad Commission) for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state for a writ of certiorari or review (hereafter referred to as a writ of review), for the purpose of having the lawfulness of the original order or decision or order or decision on rehearing inquired into and determined. * * * The review shall not be extended further than to determine whether the commission has regularly pursued its authority, *including a determination of whether the order*

*or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California. * * * Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission."*

In its application to the Supreme Court to review the orders of the Railroad Commission, Napa Valley Electric Company claimed that said orders were unlawful on the ground that they resulted in an unconstitutional impairment of the rights secured to Napa Valley Electric Company under the contract above mentioned, and, further, that the sale of electric energy by Napa Valley Electric Company to Calistoga Electric Company was not a public utility service which could be regulated by the Railroad Commission.

The Supreme Court of California made an order denying the petition of Napa Valley Electric Company to review and annul the orders of the Railroad Commission.

D. Proceedings Before the United States District Court.

On April 24, 1918, Napa Valley Electric Company filed in the District Court of the United States, Northern District of California, Second Division, a bill of complaint, seeking an injunction restraining the Railroad Commission from enforcing its orders altering the contract rate paid for electric energy supplied to Calistoga Electric Company. (Tr., 1-10.) The bill of complaint, after referring to the pro-

ceedings before the Railroad Commission, states, in paragraph XVIII (Tr., 7):

> "That thereafter and on the 20th day of June, 1917, your orator duly filed in the Supreme Court of the State of California, its petition for a Writ of Review, asking and praying that a Writ of Review issue out of said Court commanding said Railroad Commission to certify to said Court, on a day named in said Writ, a full and complete record of all the proceedings leading up to the making of said order and Decision dated May 21, 1914, together with said Order and Decision and your orator's Application for a Rehearing thereof; and also a full and complete record of all the proceedings leading up to the making of said Order and Decision dated November 15, 1916, together with said Order and Decision and orator's Application for a Rehearing thereof, and that upon the return of such Writ, said Orders and Decisions of the said Railroad Commission be reversed and vacated and annulled upon the ground that said Orders and Decisions violate the rights of your orator under the Constitution of the United States, and more particularly its rights under Section 10 of Article I thereof, and under Section 1 of Article XIV of the Amendments thereto; that the said Supreme Court of the State of California denied your orator's said Petition for a Writ of Review and refused to issue a Writ of Review, as prayed for in said Petition."

On May 9, 1918, the Railroad Commission filed in the Federal District Court a motion to dismiss the bill of complaint on the ground "that it affirmatively appears from the allegations thereof that the subject matter thereof is *res judicata,*" and, further, "that said complaint fails to state a cause of action." (Tr., 58.)

After argument, Honorable Wm. C. Van Fleet, District Judge, on March 31, 1919, rendered his decision granting the motion of the Railroad Commission that the bill of complaint be dismissed (Tr., 56-62); and on April 8, 1919, the final decree was entered, dismissing the suit. (Tr., 62.)

From this decree Napa Valley Electric Company has appealed to this Honorable Court.

II.

THE ISSUE.

The issue presented in this proceeding is whether a public utility, which has petitioned the Supreme Court of California to review and reverse an order of the Railroad Commission on the ground that the order is in violation of the Constitution of the United States, and the Supreme Court of California, which is in all respects competent to decide the question, has denied the petition and refused to give the relief sought, may thereafter prosecute an entirely new proceeding in the Federal District Court to have the order of the Railroad Commission declared unlawful for the same reasons as those urged in the previous petition to the Supreme Court of California.

The Railroad Commission claims that the doctrine of *res judicata* precludes a public utility from prosecuting a new proceeding in the Federal Court seeking a second adjudication of the very question already determined by the Supreme Court of California. The Railroad Commission further contends that the decree of the Hon. Wm. C. Van Fleet, District Judge, dismissing appellant's bill of complaint, is sustainable not

only under the doctrine of *res judicata,* but also, on the ground that the bill of complaint states no cause of action inasmuch as the State of California, through the Public Utilities Act, has given to the Railroad Commission power to regulate all the rates of public utilities, including wholesale rates for service rendered by one public utility to another public utility, and that the right of the State of California to regulate wholesale rates for public utility service is clearly established in decisions heretofore rendered by this Honorable Court.

III.

ARGUMENT.

A.

CONTROVERSY IS RES JUDICATA.

In support of our contention that the controversy herein is *res judicata,* we desire to point out that an order of the Railroad Commission fixing a rate for a public utility service becomes final and reaches the justiciable stage when the Commission has finally acted upon a petition for rehearing filed with it in the rate proceeding. At that moment the legislative act of rate fixing is ended and the utility may seek a review of the order in either the Federal Court or the State Supreme Court. Having resorted to the State Supreme Court, which is in all respects competent to determine the validity of the order of the Railroad Commission, the utility is precluded from seeking in the Federal Court a second adjudication of the same question.

1. The validity of an order of the Railroad Commission in a proceeding fixing the rates of a public utility becomes a justiciable question from the moment the Railroad Commission acts finally on the petition for rehearing filed with it in such proceeding. At that moment the legislative act of rate fixing is complete, and resort may be had to either the Federal Court or the State Supreme Court to test the validity of the rate-fixing order.

The power of a State to fix the rates of a public utility is legislative in character. The doctrine of *res judicata,* upon which we rely in this case, applies, of course, only to judicial proceedings. It becomes important, therefore, to determine at what point the legislative act of rate fixing ends, and the justiciable stage for testing the validity of the rate-fixing order begins. We desire at the outset to call attention to the fact that in California the function of rate fixing is complete when the Railroad Commission finally acts upon petitions for rehearing filed with it in rate-fixing proceedings. While the Supreme Court of California is given jurisdiction to determine the constitutionality of the rate-fixing orders of the Railroad Commission, its functions in this respect are solely judicial, the Court being given no legislative power to revise the orders of the Railroad Commission and to itself prescribe rates differing from those fixed by the Railroad Commission, such as was found by this Honorable Court in *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, to be possessed by the Supreme Court of Appeals of Virginia, which, in proceedings to review rate-fixing orders of the Corporation Commission of that State, is given legislative power "to

substitute such order as, in its opinion, the Commission should have made."

That the power of the Supreme Court of California is solely judicial appears from Section 67 of the Public Utlities Act (Stats. 1911, Ex. Session, pp. 18-55), determining the jurisdiction of that Court in reviewing orders of the Railroad Commission. Section 67 provides:

> "Within thirty days after the application (to the Railroad Commission) for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state for a writ of *certiorari* or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the supreme court, unless for a good reason shown the same be continued. No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and

discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceding. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided,* that the writ of mandamus shall lie from the supreme court to the commission in all proper cases."

This section empowers the Supreme Court of California to determination "whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination." The Court is given no power to revise the order of the Railroad Commission and to submit such order as the Court believes the Commission should have made. The Court itself has recog-

nized that, in reviewing orders of the Railroad Commission, the Court is acting in a judicial capacity only, to determine whether or not the Railroad Commission has regularly pursued its authority and whether the order of the Railroad Commission violates any right secured to the petitioner under the Constitution of the United States or of the State of California.

Pacific T. & T. Co. v. *Eshleman,* 166 Cal. 640.

The legislative act of rate fixing being complete when the Railroad Commission has finally acted upon the petition for rehearing filed in a rate proceeding, resort may then be had either to the Federal Court or to the State Supreme Court to test the validity of the rate-fixing order and to determine whether the same is in violation of the Constitution of the United States.

Prentis v. *Atlantic Coast Line Co.,* 211 U. S. 210;
Bacon v. *Rutland R. R. Co.,* 232 U. S. 134;
Palermo Land and Water Co. v. *Railroad Commission of California,* 227 Fed. 708.

2. Napa Valley Electric Company having elected to present its cause to the Supreme Court of California, which Court is competent to determine the matter, the company is precluded, under the doctrine of *res judicata,* from seeking a second adjudication of the same question in the Federal Court.

As we have pointed out, the Supreme Court of California is expressly given jurisdiction, in Section 67 of the Public Utilities Act, to review an order

of the Railroad Commission "to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California."

Pacific T. & T. Co. v. *Eshleman,* 166 Cal. 640.

Within the time provided in Section 67 of the Public Utilities Act, Napa Valley Electric Company filed with the Supreme Court of California its petition, alleging that the order of the Railroad Commission in question was unlawful and praying that "said orders and decisions of said Railroad Commission be reversed and vacated and annulled upon the ground that said orders and decisions violate the rights of your orator under the Constitution of the United States, and more particularly its rights under Section 10 of Article I thereof, and under Section 1 of Article XIV of the Amendments thereto." (Tr., 8.) The Supreme Court of California thereafter made its order denying the petition of Napa Valley Electric Company.

Our contention is that this company, having resorted to the Supreme Court of California, which Court was in all respects competent and obligated to pass upon the very question presented to it in the petition, and that Court having made its order denying the petition and refusing to give to the Company the relief sought, that the Company is precluded, under the doctrine of *res judicata,* from thereafter seeking in the Federal Court a second adjudication

of the same question. Direct authority for our contention is found in the decision of this Honorable Court in *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission,* 235 U. S. 402. In that proceeding the Detroit & Mackinac Railroad Company filed a bill of complaint in the District Court of the United States for the Eastern District of Michigan, to enjoin the enforcement of certain orders of the Michigan Railroad Commission fixing the rates to be charged by the railroad company. There existed in Michigan a statute similar to the Public Utilities Act of California, providing a procedure for a review in the courts of the State of the orders of the Michigan Railroad Commission. When the railroad company instituted its proceeding in the Federal District Court to have the orders of the Michigan Railroad Commission declared invalid, the railroad company had already resorted to and followed the procedure provided in the State statute for a review of the Commission's order in the State Courts. For this reason and upon this ground the Railroad Commission claimed in the Federal District Court that the matter was *res judicata* and that the relief sought should accordingly be denied.

After deciding that when the railroad company had resorted to the State Court "it invoked the protection of the judicial power," the decision of the Federal District Court in *Detroit & Mackinac Railway Co.* v. *Michigan Railroad Commission,* 203 Fed. 864, recites at page 871:

> "It follows that the right of the railway company to such a review as any court could give

> became fixed when the order of the Commission was promulgated; that, to prevent an invasion of its legal right, the railway company could resort to any court of competent jurisdiction; and that, having selected the Wayne Circuit Court in Chancery, and having submitted its controversy to that court, and judgment having been rendered against complainant by that court and by the Supreme Court of Michigan, the railway company cannot now try the same controversy over again in this court.
>
> "The motion for injunction must be denied."

This judgment was affirmed by this Honorable Court in *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission,* 235 U. S. 402. After reciting the facts, Mr. Justice Holmes states, at page 404:

> "The ground for the decision below was that the petitioner was concluded by the judgment of the Michigan court; and, of course, if the matter properly can be said to be *res judicata,* there is an end of the case."

And, after holding with the lower court that in resorting to the Michigan court the protection of competent judicial power had been invoked, Mr. Justice Holmes continues, at page 406:

> "Whether the commission exceeded its jurisdiction or not, as it purported to make orders, the Michigan court had jurisdiction, and the appellant is bound by its decree.
>
> "Decree affirmed."

We contend that this decision is controlling in the present proceeding. Napa Valley Electric Company, like the Detroit & Mackinac Railway Company, had the right to resort either to the Federal Court or the

State Court to test the validity of the order of the Railroad Commission. It chose to present its cause to the State court. Having made this selection, and the State court having jurisdiction to determine the cause and having rendered its judgment, the company is precluded from proceeding anew in the Federal Court for an adjudication of the same question.

3. The fact that the Supreme Court of California made its order denying the petition of Napa Valley Electric Company to review and reverse the order of the Railroad Commission without setting the petition for hearing, does not preclude the application of the doctrine of *res judicata*.

In its brief (p. 5), Napa Valley Electric Company urges that, because the Supreme Court of California made its order denying the company's petition to review and reverse the order of the Railroad Commission without first setting the petition for hearing, the doctrine of *res judicata*, upon which we rely, is inapplicable in this proceeding. There is no merit in this contention. The question of the legality of the order of the Railroad Commission was properly before the Supreme Court of California when the petition to review and reverse that order was filed by Napa Valley Electric Company. The Court then had the cause before it and was competent to render its judgment thereon. Being of the opinion that there was no merit in the claim that the order of the Railroad Commission was in violation of the Constitution of the United States, there was nothing to be accomplished by setting the petition for hearing. Such a

hearing would result only in unnecessary delay and inconvenience both to the Court and the parties to the cause.

Under the law of California, the Supreme Court has repeatedly exercised its power to deny without hearing petitions filed with it to review the judgments of inferior tribunals, and has frequently followed this course in proceedings brought before it to review and reverse orders and decisions of the Railroad Commission of California. *Ghriest* v. *Railroad Commission of California,* 170 Cal. 63; *Mt. Konocti Light and Power Co.* v. *Railroad Commission of California,* 170 Cal. 468; *E. Clemens Horst Co.* v. *Railroad Commission of California,* 175 Cal. 660; *C. A. Hooper & Co.* v. *Railroad Commission of California,* 175 Cal. 811; *City of Santa Monica et al.* v. *Railroad Commission of California,* decided December 27, 1918 (Vol. 57, Cal. Dec. 17).

There can be no question, therefore, that the Supreme Court of California has placed a construction upon the provisions of the Constitution of California and Public Utilities Act contrary to that contended for in this proceeding by Napa Valley Electric Company. This Honorable Court will, of course, accept as final that construction of the Constitution and laws of California which has been made by the Supreme Court of the State.

If Napa Valley Electric Company was dissatisfied with the order of the Supreme Court of California denying the company's petition to review and reverse the order of the Railroad Commission, the company could, by appropriate proceedings, have pre-

sented the matter to this Honorable Court for review. In *Williams* v. *Bruffy,* 102 U. S. 248, it was held that this Honorable Court had jurisdiction to review an order of the highest court of Virginia dismissing, without a hearing, an application filed with that Court for a writ of *supersedeas* to review the judgment of an inferior court of Virginia, which decision is directly in point in the present proceeding. In that case Mr. Justice Fields states, at page 250 of the Reports:

> "By the law of that State, when application is made to the Supreme Court of Appeals for a writ of *supersedeas,* the court looks into the record of the case, and only allows the writ when of opinion that the decision complained of ought to be reviewed. Its action upon the record is, in effect, a determination whether or not it presents a sufficient question for the consideration of the court. If it deem the judgment of the court below 'plainly right,' and reject the application on that ground, and its order of rejection so state, no further application for the writ can be presented; the judgment of the court below is thenceforth irreversible. So, in effect, its refusal of the writ on that ground is equivalent to an affirmance of the judgment, for the reason that the record discloses no error.
>
> "In the present case, the Supreme Court of Appeals denied the writ, stating in its order that it was of opinion that the judgment of the court of Rockingham County was 'plainly right.' To review this action of the Court of Appeals, this determination as to the character of the judgment rendered in the Circuit Court, a writ of error was prosecuted from this court. It was issued to the Court of Appeals, and was returned with a transcript of the record on file in the office of its clerk, properly certified, and the case was elaborately argued here by counsel. We came to the conclusion, unanimously, that the

> judgment of the Circuit Court of Rockingham County was erroneous, that the demurrers to the special pleas should have been sustained, and that the plaintiffs should have had judgment upon the agreed statement of facts for the amount of their claim, with interest from its maturity, deducting in the computation of time the period during which the war continued. We accordingly directed that the action of the Court of Appeals of Virginia, in refusing a *supersedeas* of the judgment of the Circuit Court, should be reversed, and that the cause should be remanded to it for further proceedings in accordance with our opinion. The judgment of this court was accordingly certified to that court, and presented to it in April, 1879."

To the same effect, see *Chaffin* v. *Taylor,* 114 U S. 309.

The application of the doctrine of *res judicata* does not rest upon the fact that the controversy in question has been set for hearing upon the calendar of the court, but upon the fact that a court competent in all respects to determine the controversy has made a final adjudication therein. As stated by Mr. Justice Clark in *Hart Steel Co.* v. *Railroad Supply Co.,* 244 U. S. 294, at page 299:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

The Supreme Court of California is, in all respects, competent to pass upon the question whether the order of the Railroad Commission fixing the rate at which electric energy should be supplied by Napa Valley Electric Company to Calistoga Electric Company violates any of the rights secured to Napa Valley Electric Company under the Constitution of the United States. Napa Valley Electric Company presented its petition to the Supreme Court of California, claiming that the order of the Railroad Commission was in violation of the Constitution of the United States, and asked the Supreme Court of California to adjudicate that question. The Court, having the matter properly before it, made its final order denying the petition of the company. The authorities to which we have referred show conclusively that, under the doctrine of *res judicata,* Napa Valley Electric Company is precluded from seeking in the Federal Court a second adjudication of the very matter which had been presented to and determined by the State Supreme Court.

B.

THE RAILROAD COMMISSION HAS POWER TO FIX THE WHOLESALE RATES FOR PUBLIC UTILITY SERVICE AND CAN EXERCISE THIS POWER IRRESPECTIVE OF EXISTING CONTRACTS SPECIFYING THE RATE FOR SUCH SERVICE.

In considering the jurisdiction of the Railroad Commission to fix the wholesale rates for public utility service irrespective of existing contracts, we shall

point out, first, the provisions of the Constitution of California and the Public Utilities Act, which unquestionably vest this authority in the Railroad Commission, and then refer to decisions of this Honorable Court upholding the power of a State to exercise such authority.

1. California Constitution, Article XII, Section 23.

Section 23, Article XII of the Constitution of California, as amended October 10, 1911, provides in part as follows:

> "Every private corporation, and every individual or association of individuals, owning, operating, managing or controlling any * * * plant or equipment within this state * * * for the production, generation, transmission, delivery or furnishing of *heat, light,* water or *power* * * * *either directly or indirectly, to or for the public* * * * *is hereby declared to be a public utility* subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished or services rendered by public utilities as shall be conferred upon it by the Legislature, *and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."*

This section of the Constitution declares that every corporation engaged in the production, generation, transmission, delivery or furnishing of heat, light, or power, *directly or indirectly to or for the public,* is a public utility subject to control and regulation by the Railroad Commission, and that the Railroad Commission shall have and exercise such power and jurisdiction to fix the rates to be charged for commodities furnished or services rendered by such public utilities as may be conferred upon it by the Legislature, and that the power of the Legislature to so confer jurisdiction upon the Railroad Commission shall be plenary and unlimited by any provision of the Constitution. This plenary power of the Legislature to define the jurisdiction of the Railroad Commission over public utilities has been fully reviewed and upheld by the Supreme Court of California in *Pacific T. & T. Co.* v. *Eshleman,* 166 Cal. 640.

2. Public Utilities Act.

Under the provisions of Section 23, Article XII, of the Constitution of California, the Legislature enacted the Public Utilities Act. This Act, in Section 2, defines the various persons and corporations subject to regulation by the Railroad Commission, and in Section 2 (bb) as amended (Stats. 1913, pp. 934, 938) defines the term "public utility," when used in the Act, as follows:

> "The term *'public utility'* when used in this act, includes every * * * electrical corporation * * * where the service is performed for or the commodity delivered *to the public or any portion thereof."*

The section then defines the term "public or any portion thereof" as follows:

> "The term *'public or any portion thereof'* as herein used means the public generally, or any limited portion of the public including a person, private corporation, municipality or other political subdivision of the state, for which the service is performed or to which the commodity is delivered, and whenever any * * * electrical corporation * * * performs a service or delivers a commodity to the public or any portion thereof for which anv compensation or payment whatsoever is received, such * * * electrical corporation * * * is hereby declared to be a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this act."

The section then specifically places under the jurisdiction of the Railroad Commission wholesale service such as that involved in this proceeding. The section then continues:

> "Furthermore, when any person or corporation performs any service or delivers any commodity to any person or persons, private corporation or corporations, municipality or other political subdivision of the state, *which in turn either directly or indirectly, mediately or immediately, perform such service or deliver such commodity to or for the public or some portion thereof,* such person or persons, private corporation or corporations, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act."

Section 32 of the Public Utilities Act vests in the Railroad Commission complete jurisdiction over all

rates, including contract rates, charged by any public utility for any service or product or commodity furnished. The section provides:

> "Sec. 32. (a) Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, fares, tolls, rentals, charges or classifications or any of them, demanded, observed, charged or collected by any public utility *for any service or product or commodity,* or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges, or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.
>
> "(b) The commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, *contract* or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts and practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or schedule or schedules, in lieu thereof."

This section empowers any aggrieved person or corporation to complain to the Railroad Commission

with reference to any public utility rate, wholesale or retail. Furthermore, Section 62 specifically empowers *public utilities* to file complaints with the Railroad Commission with reference to any matter as to which other parties may complain. A public utility, therefore, may complain against the rate charged it by another public utility. Section 62 provides:

> "Any public utility shall have a right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint may be heard *ex parte* by the commission or may be served upon any parties designated by the commission."

Under these provisions of the Constitution of California and the Public Utilities Act the people of the State have unquestionably vested the Railroad Commission with authority to fix the rates for all services supplied by public utilities, wholesale as well as retail. The only remaining question is whether the State has power to do this under the Constitution of the United States ,and the answer to this question involves a determination of the fundamental basis upon which the power of the State to regulate public utilities rests.

3. Basis of the power of a State to regulate any business is that the business is one of public interest and concern.

In a series of decisions from *Munn* v. *Illinois,* 94 U. S. 113, to *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, this Honorable Court has discussed and announced the fundamental basis for the power of

a State to regulate business and to fix the rates for commodities furnished and service rendered. Mr. Justice McKenna, in the *German Alliance Insurance Company* case, after analyzing the previous decisions, makes the following pronouncement at page 411:

> "The cases need no explanatory or fortifying comment. *They demonstrate that a business, by circumstances and its nature, may rise from private to public concern and be subject, in consequence, to governmental regulation.* And they demonstrate, to apply the language of Judge Andrews in the *Budd* case (117 N. Y. 1, 27) that the attempts made to place the right of public regulation in the cases in which it has been exerted and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. *'The underlying principle is that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation'."*

The underlying principle of the power of a state to regulate the rates charged in any business is here declared to be that the business is one of public interest and concern. We do not believe it necessary to quote further from these authorities, as the matter is very fully discussed and the principle definitely established in the *German Alliance Insurance Company* case.

Furthermore, the principle is equally well established that a State has the right itself to determine and declare what particular business is a matter of public interest and concern and that the State's declaration must be upheld unless the court is prepared to say that

under no set of circumstances is it conceivable that such a declaration would be justified.

In *Munn* v. *Illinois*, 94 U. S. 113, in passing upon this question with reference to the constitutionality of a State statute declaring that the rates for warehousing should thereafter be subject to regulation, Mr. Chief Justice Waite, at page 132, states:

> *"For our purposes we must assume that, if a state of facts could exist that would justify such a regulation, it actually did exist when the statute now under consideration was passed.* For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. *But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."*

See also *Brass* v. *North Dakota*, 153 U. S. 391, 403;
German Alliance Insurance Co. v. *Lewis*, 233 U. S. 389, 413.

The State of California has, in unmistakable language, declared that the rates for wholesale and retail service of public utilities shall be subject to regulation. This declaration cannot be held to be in violation of the Constitution of the United States unless it is inconceivable that any set of facts or circumstances would justify such a declaration. In other words, if it is conceivable that public interest might, under any set of circumstances warrant the regulation of the wholesale rates for public utility service, the declara-

tion by the State of California that such wholesale rates shall be regulated must be upheld.

This is the underlying basis for the power of a State to regulate business. *The test is not as urged by appellant, whether the service or commodity supplied is actually used up and consumed by the one receiving it, but whether the transaction is one of public interest or concern.* When this test is applied it must be apparent that wholesale public utility rates are not beyond the power of the State to regulate.

It cannot be said that the patrons of a public utility are not concerned with the wholesale rate. If the public utility is to exist the patrons must supply sufficient revenue to keep it going, otherwise they can get no service. The revenue must be at least sufficient to pay the operating expenses, the chief of which may be the wholesale rate. Accordingly, an excessive wholesale rate, if held to be beyond the power of the State to regulate, will be reflected in the rates which the patrons must pay in order that the public utility business continue.

In fixing the wholesale rate for public utility service the State is not presuming, as urged by appellant, to fix the operating expenses of the purchasing company, *but is prescribing the rate to be charged by the selling company for a public utility service.* It is of no consequence to the selling company what the purchaser does with the electric energy received. The purchaser may use the electric energy to run dynamos, which, in turn, generate additional energy for retail distribution; the purchaser may pass the energy through transformers and then use it for retail distribution; the purchaser

may use the energy in running a factory or other industrial business, or the purchaser may use the energy in lighting his home. In each instance, from the standpoint of the purchaser, the cost of the electric energy is an operating expense, but from the standpoint of the public and the public utility selling the energy, the transaction is merely the sale of a public utility service, the rate for which, the people of the State have decided, is a matter of public interest and concern and shall be subject to regulation.

Furthermore, the same facts which justify the regulation of the retail rates exist with reference to wholesale rates. The reasonableness of one varies just as does the reasonableness of the other. Changing costs of labor, fuel, supplies, money and all other elements which enter into the reasonableness of the retail rate for service furnished by a public utility are present with reference to the wholesale rate.

Some public utilities are engaged chiefly in supplying wholesale service. They are in possession of the streams and other natural resources upon which the public utility service is dependent. If the wholesale rates cannot be regulated, the distributing utilities and the public served by them are at the mercy of the wholesale companies.

In view of all these facts it is impossible to say that the wholesale rate is not of interest or concern to the public.

Having power to regulate wholesale rates for public utility service, the State can exercise this power

irrespective of existing private contracts specifying the rates to be charged for the service rendered.

Union Dry Goods Co. v. *Georgia Public Service Corporation*, 248 U. S. 372;
Atlantic Coast Line Railroad Co. v. *Goldsboro*, 232 U. S. 548;
Limoneira Co. v. *Railroad Commission of California*, 174 Cal. 232;
Southern Pacific Co. v. *Spring Valley Water Co.*, 173 Cal. 291.

In claiming that wholesale public utility service is beyond the power of the State to regulate, appellant refers to *Marin Water & Power Co.* v. *Town of Sausalito*, 168 Cal. 587; *Atchison, Topeka and Santa Fe Railway Co.* v. *Railroad Commission of California*, 173 Cal. 577, and *Allen et al* v. *Railroad Commision*, 56 Cal. Dec. 326; 175 Pac. 466. These cases do not support appellant's contention.

In the first case the water company sued the Town of Sausalito on its contract to recover payment for water delivered. As was stated by Mr. Justice Shaw in his concurring opinion at page 606:

> "The case, as presented, is the very simple and ordinary case of an action to recover a sum due upon a contract as the purchase price of property sold and delivered in pursuance thereof."

Whether the water company was acting in its capacity of a public service corporation when delivering water wholesale to the municipality was not decided in the case and was not necessary to the decision thereof. Furthermore, the case arose and was presented prior to the declaration by the people of the

State in their Constitution and in the Public Utilities Act that wholesale public utility service should be subject to regulation. Since these declarations were made the Town of Sausalito filed a complaint with the Railroad Commission, asking it to fix the rate for water received from Marin Water & Power Company. The Railroad Commission assumed jurisdiction over the proceeding, and after hearing, prescribed a rate which it found to be just and reasonable. (Vol. 8, Opinions and Orders of the Railroad Commission of California 252; Vol. 10, Opinions and Orders of the Railroad Commission of California, 726.) After the order of the Railroad Commission was made no one questioned the jurisdiction of the Railroad Commission in the premises and no attempt was made to have the action of the Commission judicially reviewed.

The other cases to which appellant refers have nothing whatever to do with the question of wholesale public utility service. They merely define the public undertaking which had been assumed by the utility in question. There is nothing in these cases indicating that within the limits of its public undertaking the utility shall be subject to regulations as to retail service and not as to wholesale service.

Finally, we cannot allow to pass without comment the attempt made by counsel for appellant, at page 44 of his brief, to place the Judge of the District Court on record as having decided that the Railroad Commission of California has no jurisdiction over the public utility service and the rate therefor involved in this proceeding. Judge Van Fleet made no such ruling. His decision speaks for itself. (Tr. 59.) Ap-

pellant's counsel relies apparently upon a question purported to have been asked by Judge Van Fleet during the course of the oral argument upon the motion of appellees to dismiss the bill of complaint. That argument is not of record in this proceeding and could not be, for it was not even transcribed. Accordingly, counsel's assertion is wholly unauthoritative and obviously misleading.

We respectfully submit that under the decisions to which we have referred the final decree of the lower court should be affirmed.

Respectfully submitted,

DOUGLAS BROOKMAN.
Attorney for Appellees.